Towards health with justice

Litigation and public inquiries as tools for tobacco control

Community Health Cell
Library and Information Centre
367, " Srinivasa Nilaya "
Jakkasandra 1st Main,
1st Block, Koramangala,
BANGALORE - 560 034.
Phone : 5531518 / 5525372
e-mail:sochara@vsnl.com

Towards health with justice

Litigation and public inquiries as tools for tobacco control

Report prepared by D. Douglas Blanke, Director of the Tobacco Law Project, William Mitchell College of Law, for the Tobacco Free Initiative, WHO.

A product of NMH Communications.
Creating space for public health.

CONTENTS

In the Name of God, the Compassionate, the Merciful

FOREWORD

Over the years, evidence has proved that tobacco companies have undertaken, and are still undertaking, a great number of activities to impede health action. It has also been proven beyond doubt that these companies have hidden many facts about the hazards of smoking, that they have fought against the imposition of tobacco control laws and that they have attempted to influence decision-makers everywhere in order to oppose tobacco control measures.

Tobacco companies have been using all possible tools to market their deadly product in full knowledge of its harmful nature. Inevitably, the time has now come for public health workers to fight fire with rigour. Public health workers must also use all means available to them in order to achieve their objective of eradicating the tobacco epidemic.

The World Health Organization's Tobacco Free Initiative (TFI) has recognized the need for public health workers to diversify their tobacco control efforts into fields other than science. During the course of the past year, TFI has developed a strategy for mobilizing public inquiries in order to open up the arena for the diversification process.

This monograph has been developed by TFI in order to provide both countries and individuals at national, regional and global levels with information, support and technical assistance on litigation and public inquiries as tools for tobacco control. These two elements are key emerging techniques in the field of tobacco control. Therefore, it is crucial that public health workers seize this opportunity to step beyond the realm of science and medical statistics and embrace other techniques and tools for tobacco control.

This monograph is based on the "Consultation on Litigation and Public Inquiries as Public Health Tools" organized and held by WHO Regional Office for the Eastern Mediterranean Region, in collaboration with WHO headquarters, from 5 to 7 February 2001, in Amman, Jordan. During this Consultation, more than 20 Member States expressed an urgent need to understand the scope and magnitude of litigation and public inquires as tools for tobacco control in order to determine the best ways to combine science and law in curbing the tobacco epidemic.

Diseases related to tobacco use kill more than four million people every year. The Eastern Mediterranean Region in particular faces a great challenge due to high rates of tobacco consumption. In most of the countries of this Region, the rates of smoking are 50% in men and more than 10% in women. The situation among the youth of both sexes is particularly serious. In some Member States the prevalence reaches the level of 20%. These terrifying figures are the outcome of direct and indirect advertising campaigns that promote tobacco, and are a strong warning. If the present situation continues, this Region will be faced with disaster.

Confident as we are of the legitimacy of our cause and our purpose, we must act together as health workers and cooperate with other community sectors to take a united stand against the strongest threat to health in the modern age. We need to urge all other sectors to take part in tobacco control activities. This step has been facilitated through the tremendous work done by TFI to put together this monograph.

The work that started with WHO inquiry report on tobacco industry activities to undermine tobacco control efforts in WHO was released in July 2000, has led to the release of two important Eastern Mediterranean Regional Office documents, Voice of Truth, Volumes 1 and 2. I hope and anticipate that this monograph will generate even more support for tobacco control in the Region and the world as a whole.

Finally, I would like to thank all those who contributed to this monograph and urge that collaboration continue between TFI and all Regions, so that such successful work may be undertaken on a wider scale.

Dr Hussein A. Gezairy
Regional Director

WHO Eastern Mediterranean Region

INTRODUCTION by Dr Derek Yach

Four years ago the World Health Organisation embarked on a tobacco control journey with the principle aim of saving lives and preventing disease. The challenge was historic for many reasons but two stand out for mention. This was the first time in its then 51-year history that the world body was exercising its constitutional treaty-making right. By agreeing unanimously to work on writing global rules for the sale, marketing and promotion of tobacco and tobacco products, Member States held out the promise of health for future generations. The Framework Convention on Tobacco Control (FCTC) is public health history in the making.

Why tobacco, one may ask. The medical answer is straightforward. Tobacco kills one in two of its regular users. That is over four million preventable deaths every year. The public health and economic answers are straightforward too--tobacco is bad economics and disastrous for public health: but progress has been thwarted by a tobacco industry seeking new and younger tobacco users. Tobacco industry tactics constitute the single greatest hurdle on the road to tobacco control. By catalysing a sustained exchange between scientists, economists, policy-makers and lawyers, the FCTC process has sifted tobacco industry fiction from public health fact.

"Towards Health With Justice - Litigation and Public Inquiries as Tools for Tobacco Control" comes at a very opportune moment. As we stand fifteen months from signing a historic piece of international health legislation, this monograph cuts new ground by describing the power of legislation, litigation and public enquiries as public health tools. It is a just response to a call by WHO Director-General Dr. Gro Harlem Brundtland for greater vigilance and justice in tobacco control. WHO and its Member States were alerted by an internal WHO enquiry in August 2000 that showed how tobacco companies worked together to attempt to subvert the organisation's work in tobacco control.

The EMRO region took the lead in this area by convening a meeting of national, regional and international experts in Amman, Jordan. Tobacco industry documents analysed by the region in two volumes entitled "Voice of Truth" brought further evidence of overt and covert tobacco industry activities in the region. Several countries in the region and beyond are conducting similar enquiries contributing to the growing body of knowledge and truth about tobacco industry behaviour. The most recent being the report that focuses on smuggling in Iran.

This monograph represents a start in the process of globalising tougher legal actions against tobacco. These actions are a necessary complement to price increases,

advertising bans, smoking cessation, smoke-free public places and public education. Each places its role in contributing to a social climate that makes tobacco-free policies and practises the easy and obvious ones. We hope that the ideas in the monograph will stimulate rapid and effective action against the world's largest preventable cause of death.

Dr Derek Yach

Executive Director, Noncommunicable Diseases and Mental Health

WHO

EXECUTIVE SUMMARY

Introduction

The global epidemic of tobacco use presents unconventional challenges and invites unconventional responses. One non-traditional intervention, in particular – litigation – has captured worldwide attention in the wake of recent legal cases in the United States of America and elsewhere. In response to widespread interest in this new public health tool, the World Health Organization (WHO)has begun efforts to assist Member States in understanding the global implications of tobacco litigation. In February 2001, with the generous support of the Kingdom of Jordan, WHO Regional Office for the Eastern Mediterranean invited fifty senior officials, jurists, academics, legal practitioners and other experts from nearly twenty Member States to Amman, to begin building global capacity for more effective use of litigation and public inquiries. This report is one outgrowth of the process begun in Amman.

A Brief History of Tobacco Litigation in the United States

Most global experience with tobacco litigation comes from the United States, where lawsuits have had a checkered history of nearly fifty years. In two "waves" of litigation from 1954 through the 1980s, tobacco companies were successful in defeating hundreds of cases brought by injured smokers, first by denying that tobacco causes diseases, and, later, by arguing that the hazards of smoking are common knowledge. This thirty-year record of success was largely the product of a calculated "scorched earth" strategy in which tobacco companies made every case prohibitively expensive for even the most determined litigants.

In the early 1990s, three factors converged to create a new "third wave" of cases that would end the tobacco industry's invincibility. Revelations from within the industry provided a new evidentiary foundation for action; new forms of aggregated litigation allowed the mobilization of unprecedented resources; and new legal theories sidestepped tobacco companies' traditional victim-blaming defenses. These factors spurred the filing of hundreds of cases. While most of these cases, like those of earlier decades, have failed, a handful of massive cases have succeeded and have shown beyond dispute the power of litigation to advance tobacco control.

Actions by state governments in the mid-1990s led to the five largest legal settlements in history, forcing release of millions of secret industry documents, along with important

changes in tobacco marketing and enormous monetary recoveries. Huge aggregated "class action" lawsuits, on behalf of large groups of victims, have been largely unsuccessful, but two class actions have achieved dramatic interim results that show the potential power of aggregated claims. Individual personal injury cases have been reinvigorated, as juries in a handful of cases have not only found for individual smokers, but have also awarded large sums in punitive damages -- results which, if upheld on appeal, will make individual cases more economically viable than ever.

Understandably, the handful of dramatic successes in recent U.S. litigation has captured worldwide interest. Yet it is important to remember that these successes remain exceptions, and that most cases continue to fail. This makes it crucial to approach litigation carefully, to understand the challenges of adapting the U.S. experience for other legal systems and traditions.

Litigation: The Global Experience

Outside the U.S., tobacco litigation is a young phenomenon, and clear patterns do not yet exist, but some recent cases show the potential for litigation to advance tobacco control dramatically.

In Australia, and more recently in Norway, pioneering cases are advancing the rights of workers and consumers to be protected from dangerous second-hand smoke. For the first time, Islamic courts will consider health care cost recovery claims in new Saudi Arabian litigation. Public interest writ litigation in Bangladesh and Uganda offer proof that, even without great financial resources, creative legal arguments can produce rapid social change.

Most importantly, recent public interest writ litigation in India has accomplished dramatic results, prompting the Supreme Court of India to require nationwide implementation of broad restrictions on public smoking. Other writ petitions in India show that this is not an isolated success, with one still-pending petition holding the promise of a possible national criminal investigation of illicit trade in tobacco products, and with another recent case before the High Court of Kerala having paved the way for the Supreme Court's action on public smoking. These Indian examples offer a possible model for health officials and advocates worldwide.

Starting Point: The Documents

The starting point for consideration of possible public inquiries or litigation is an analysis of relevant information in the thirty-five million pages of tobacco industry documents now available to researchers. A key link between the medical evidence and the legal issues, these documents have the power to re-frame public debate and set the stage for legal action. Priority attention should be given to encouraging the release of additional documents, improving access to those that are public, and to analyzing and disseminating their contents.

Public Inquiries as a Manageable Alternative

Used effectively, public inquiries can be "truth machines." For many Member States, they may offer an attractive alternative, or prelude, to litigation. A recent inquiry in the United Kingdom offers a model for formal parliamentary investigations, while recent WHO reports on tobacco industry interference with WHO programs, and with health programs in the Eastern Mediterranean Region, illustrate the effectiveness of research-based inquiries. Public inquiries involve risks and must be conducted carefully. Nevertheless, they offer many advantages that commend them as a possible approach.

Choices and Decisions: A Litigation Topography

The risks and benefits of litigation cannot be weighed without first considering who would bring the proposed case, who would be sued, where the case would be filed, what legal theories would be asserted, what remedies would be requested, and how the case would be financed. The answers to these questions will determine the prospects for success.

Litigation can be brought by individuals, classes of individuals, governments, private entities or nongovernmental organizations (NGOs). Possible defendants include not only international tobacco companies, but also state-owned enterprises, tobacco sellers, governments, employers and businesses. The obvious venue for litigation is in the location where the tobacco is consumed, but some Member States have elected to file cases in courts of the United States -- a strategy with some advantages but a number of potential disadvantages.

Selecting the legal basis for a case requires care, discipline, and respect for a country's legal and social circumstances. Cases have asserted many different legal theories, arising in tort or personal injury, contract, specific local statutes and fundamental constitutional rights, but the most successful cases of the future may be those that

frame the problem in entirely new ways. Litigation can seek relief ranging from the release of documents to creative declaratory and injunctive relief to large monetary recoveries. Because most tobacco litigation is very costly, it is important to consider how a case will be funded. In many legal systems, "loser pays" rules, restrictions on contingent fees and restrictions on aggregated claims may limit financing options. Where contingent fee arrangements are permitted, they must be approached carefully.

Litigation: Lessons Learned

The dramatic successes of some lawsuits have made Member States eager to understand the lessons of this experience for their situations, and to identify opportunities for globalizing tobacco litigation. But litigation is not for everyone, and it is not a panacea. Nor can it be exported, ready-made, from one country to another. It must be tailored and adapted to the unique circumstances and traditions of each country.

For this to happen, global capacity must be built and strengthened. Member States will need support and assistance in developing the elements necessary, including the assembly of specialized expertise, the encouragement of collaboration, and assistance with concrete tasks such as document analysis. In the longer term, the potential for new forms of international litigation or new international institutions needs to be explored.

Steps Forward

Participants in the Amman Consultation agreed that the immediate barrier to progress is the need to institutionalize a process for supporting Member States in addressing the complex issues involved. This requires creation of a central mechanism as a focal point for helping Member States to make effective use of tobacco documents, public inquiries and litigation. By assisting Member States with specific technical aspects of these challenges, this mechanism would provide a powerful catalyst to global progress.

Conclusion

Used properly, the law can help transform the paradigms of tobacco control, awaken public outrage, strengthen public policies and redress injuries. This powerful new tool is not for everyone. Like fire, it must be handled with care. But it is time to make the law an integral component of the comprehensive global tobacco control agenda, in a way that advances both health and justice.

I. INTRODUCTION

The statistics are staggering. One-third of the world's adults smoke cigarettes, and half of these smokers will die prematurely.[1] If current trends continue, tobacco will take the lives of 500 million people alive today. By 2020, tobacco will account for one-third of all adult deaths in the world.[2]

What makes these figures even more tragic is that they are unnecessary. The health effects of tobacco are well known. Indeed, nothing has been more widely studied. More than 80,000 scientific publications have linked tobacco to dozens of causes of death.[3] And yet global tobacco use continues to increase, especially in developing countries.[4]

This trend is no accident. Unlike malaria, tuberculosis or other infectious diseases, tobacco use is promoted by a wealthy, influential and sophisticated global industry. As recent investigations have shown, that industry uses its power not only to market its products, but also, and more surreptitiously, to undermine the efforts of public health authorities.[5] Of the many threats to global health, only the tobacco epidemic has corporate sponsorship.

This unconventional challenge invites unconventional responses. Through its Tobacco Free Initiative, WHO is working to increase awareness of the scientific evidence, advance comprehensive, multi-disciplinary interventions, and support the use of promising new approaches. Some of these, like the clinical treatment of nicotine dependence, resemble traditional public health strategies. Others, like product regulation, are less traditional, but still familiar to health authorities.

---

[1] World Health Organization, *Addressing the Worldwide Tobacco Epidemic Through Effective, Evidence-Based Treatment, Expert Meeting, March 1999, Rochester, Minnesota USA* (2000) (WHO/NMH/TFI/00.02) at 16.

[2] *Id.*

[3] World Health Organization, *Monograph: Advancing Knowledge on Regulating Tobacco Products,* (2001) (WHO/NMH/TFI/01.2), at 6, 13.

[4] *Id.*, at 18.

[5] *See, e.g.*, World Health Organization, *Report of the Committee of Experts on Tobacco Industry Documents: Tobacco Company Strategies to Undermine Tobacco Control Activities at the World Health Organization* (2000), http://tobacco.who.int/repository/stp58/who_inquiry.pdf.

But one new form of intervention stands apart. Litigation, a process outside the experience of most health authorities, has suddenly been thrust to the center of attention by the astonishing results of a series of cases in the United States of America and, more recently, several other countries. Around the world, health authorities and other leaders have been mesmerized by these results, curious about the process that produced them and eager to understand the implications for their own countries. Understandably, much attention has focused on the massive financial recoveries in a few cases, encouraging the unrealistic hope that similar litigation in other countries might offer easy and unprecedented wealth — a hope that some private attorneys are pleased to exploit. More thoughtful observers have focused first on the tobacco industry documents uncovered in the course of the litigation, and their power to advance public policy-making. Still others have looked to the role of litigation, sometimes in concert with public inquiries, in shaping debates and educating the public. All of these observers have been eager to tap the evident power of this new approach, but uncertain whether this is possible and, if so, how to begin.

To many health experts, the idea of litigation as a strategy is not only mysterious, but also vaguely uncomfortable. By training, they expect health solutions to be found in a research lab, a clinical setting or a community intervention — not in a courtroom. Adversarial proceedings, legal jargon, elaborate pleadings and complicated appeals are foreign to their experience. Differences between the U.S. legal system and other systems make it even more difficult for them to assess the significance of U.S. cases for their own countries, as does the unusual degree to which litigation is an accepted part of U.S. society.

These factors complicate the challenge of implementing the lessons of successful tobacco litigation across borders, and have frustrated countries eager to make use of this new tool. To help them overcome these obstacles, many have looked to WHO for information, support, and technical assistance.

WHO and the Tobacco Free Initiative

Under the leadership of its current Director General, Dr. Gro Harlem Brundtland, WHO has given priority attention to tobacco and health. Immediately upon assuming office in July 1998, the Director General formalized this commitment by establishing the Tobacco Free Initiative (TFI), an ambitious, Cabinet-level project to coordinate a more strategic and aggressive response to the global problem of tobacco use. TFI seeks to increase awareness of the issue, mobilize resources and foster new partnerships — all to stimulate adoption of more effective policies at the national, regional and global levels.

To further these objectives, TFI has organized and supported a whirlwind of consultations, conferences and expert meetings; regional and national advocacy; research; publications and other efforts to meet needs identified by Member States.

Especially significant among other tobacco-related initiatives of the World Health Organization was the inquiry and report of a Committee of Experts appointed by the Director General to investigate whether the tobacco industry had secretly attempted to sabotage work of WHO The Committee's July 2000 report [6] uncovered chilling evidence of elaborate, systematic and carefully-concealed schemes to subvert every aspect of WHO's tobacco-related programs over a period of many years.

The centerpiece of WHO's increased focus on tobacco, however, is the development of the proposed Framework Convention on Tobacco Control (FCTC). Authorized by the World Health Assembly in 1999, and to be negotiated for submission to Member States by 2003, the proposed Framework Convention will be the first global treaty on tobacco control. Even in its formulation, however, the Framework Convention has become a rallying point for increased global understanding of the relationships between tobacco and health, mobilization of constituencies and resources, and accelerated adoption of strong policies at the national level.

The Amman Consultation

In response to requests from Member States for assistance in evaluating the potential of litigation and public inquiries as tools for tobacco control, WHO Regional Office for the Eastern Mediterranean organized an international Consultation on Litigation and Public Inquiries as Public Health Tools for Tobacco Control, held in Amman, Jordan, in February 2001. With the generous support of the Kingdom of Jordan, as well as the endorsement and attendance of Her Royal Highness Queen Rania Al Abdullah, the Consultation brought together fifty representatives of nearly twenty Member States, including senior officials, jurists, legal practitioners, academics, advocates and other leading experts, to begin a concerted effort to increase global capacity for successful litigation and public inquiries.

Over the course of the three-day Consultation, papers were presented on the leading examples of the use of litigation and public inquiries to advance tobacco control.

---

[6]World Health Organization, *Report of the Committee of Experts on Tobacco Industry Documents: Tobacco Company Strategies to Undermine Tobacco Control Activities at the World Health Organization* (2000), http://tobacco.who.int/repository/stp58/who_inquiry.pdf.

Participants reviewed both positive and negative aspects of alternative approaches, identified lessons learned, and conferred about the possible implications of these lessons for different legal systems and cultures. Through intensive discussion and debate, working groups of participants identified key barriers to progress and reached consensus on important next steps.

In particular, discussion focused on the types of support and assistance necessary to enable Member States to adequately evaluate opportunities for litigation or investigations, as well as the assistance needed to successfully adapt these new tools to the individual circumstances of Member States. These consultations found a strong desire to harness these powerful new instruments, and a deep consensus on the need to build global capacity to do so. The key to creating this capacity, participants agreed, would be the development of resources for technical and financial support to individual countries, including assistance in analyzing industry documents, developing legal strategies and options, assembling resources, marshalling and analyzing evidence and tailoring legal theories, arguments and procedures to the requirements of particular legal systems.

Following the Consultation, WHO has taken additional steps to continue the exchange begun in Amman. Publication of this paper, identifying key observations flowing from the Consultation, represents one such step. International negotiations toward a Framework Convention on Tobacco Control have provided additional venues for ongoing examination of the role of litigation, as Member States consider issues of liability and compensation in the context of the proposed Framework Convention. WHO is supporting ongoing research and reporting on tobacco industry activities in particular countries and regions, as revealed by the industry documents. Perhaps most importantly, efforts continue to identify resources to begin assembling the support and technical expertise identified as critical for successful international collaboration.

II. FIFTY YEARS IN THE COURTS: A BRIEF HISTORY OF TOBACCO LITIGATION IN THE UNITED STATES

Although litigation has been used with mixed success in a growing number of countries, especially in recent years, the fact remains that most experience with tobacco litigation derives from the United States of America, where tobacco litigation has had a checkered history of nearly fifty years. That history is often described in terms of three waves.

First Wave

The first wave of litigation dates from 1954. As early as 1950, landmark epidemiological studies had found an apparent association between cigarettes and lung cancer. These provocative findings were soon reported in several popular publications, generating not only sharp denials by cigarette manufacturers, but also, and less predictably, skepticism by some leading medical experts, who considered the findings inconclusive, if not doubtful. Conclusive or not, these new findings led directly to the filing, in 1954, of the first tobacco lawsuit, a personal injury case brought on behalf of a Missouri smoker — the first in an eventual "wave" of 150 cases that would span almost three decades.[7]

Notwithstanding the troubling new medical studies, smoking remained a ubiquitous part of popular culture in the United States. About half of all adults smoked cigarettes. Smoking was not only accepted behavior; it was almost expected, whether among physicians, judges, political leaders, business executives, film stars or athletes. Tobacco advertising was all-pervasive. Smoking was accepted in almost every setting, from the courts to the Congress to medical offices.

Despite this unfavorable climate, the first wave of cases — all brought on behalf of individual smokers and their families (and almost all involving lung cancer) — alleged that cigarette manufacturers were liable for monetary damages for the medical expenses, lost wages, and pain and suffering caused by their products. These cases were grounded in varying theories of negligence, misrepresentation and breach of warranty.

---

[7] *See generally* Robert L. Rabin, "A Sociolegal History of Tobacco Tort Litigation," 44 *Stanford Law Review* 853 (1992).

Almost all of these cases were dismissed or withdrawn before reaching trial. Without exception, those few that did reach trial were unsuccessful.

This bleak record was the product of a calculated, and spectacularly successful, industry strategy, adhered to without exception for decades. Central to that strategy was a vehement denial of any causal link between smoking and lung cancer (or any other disease) — a denial maintained through the elaborate cultivation of a purported scientific "controversy" about the medical evidence. At the same time, manufacturers argued that they lacked sufficient knowledge or notice of any health risks to incur any duty to warn their customers. These arguments proved a complete defense to every case to reach a jury for thirty years.

The Second Wave

A second wave of tobacco litigation, in the 1980s and early 1990s, saw the tobacco industry defend itself with equal success against nearly 200 additional personal injury cases, many of them alleging additional new legal theories, including strict product liability and negligent failure to warn. By this time, cigarettes were widely considered to be unhealthy, even though the nature and extent of the hazard were not well understood. A landmark 1964 report to the U.S. Surgeon General had found cigarettes to be a cause of lung cancer in men, although other effects would not be generally understood for some time.[8] In 1965, cigarette manufacturers had secretly acquiesced in legislation adding tepid warning labels to cigarette packages.

Now these companies smoothly reversed arguments they had made for decades. For years they had denied their products were unsafe. Now they insisted instead that the hazards they had indignantly denied for so long were no longer preposterous, but were suddenly, in fact, "common knowledge" — so much so that smokers were fully aware of them and had, in fact, "assumed the risk" of death and disease. So well known were these risks, manufacturers argued, that smokers could not claim to have "relied" on the industry's own denials. Perhaps most audaciously, manufacturers were able to invoke these defenses without so much as acknowledging the inconsistencies of their positions, and without ever conceding that tobacco causes disease.

---

[8]Not until 1988, for example, would the Surgeon General have the scientific basis to label nicotine as addictive.

Scorching the Earth

Key to the tobacco industry's success in the first two waves of personal injury litigation was its unflinching commitment to a "scorched earth" litigation strategy that continues to this day. That strategy ensured, as it does today, that even the most promising and best-supported case will be fraught with difficulty.

The industry's approach is to commit almost unlimited resources to making every case, regardless of the amount at stake, a never-ending quagmire of expense for the plaintiff and the plaintiff's attorneys. In this take-no-prisoners approach, no point is too trivial to serve as an excuse for artificial disagreement, unnecessary tangential discovery, endless appeals, quarrelsome objections, and general delay and obfuscation. The goal is to make even the most straightforward case a grinding, exhausting, and ultimately unsustainable, ordeal.

Near the end of the second wave of cases, one tobacco company attorney secretly summarized this philosophy. Alluding to a statement by U.S. General George Patton in World War II, that the way to win a war is not to die for one's country, but to "make the other son-of-a-bitch die for his country," the lawyer explained that:

> **[T]he aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive for plaintiffs' lawyers, particularly sole practitioners. To paraphrase General Patton, the way we won these cases was not by spending all of [R.J. Reynolds'] money, but by making that other son of a bitch spend all of his.**[9]

While it is not unusual for a defendant to delay litigation, or to drive up a plaintiff's expenses, the tobacco industry's mastery of this approach is, in the words of one observer, "unique in the annals of tort litigation."[10] So well did this approach serve the tobacco industry that, through the hundreds of cases litigated in the 1950s, 60s and 70s, it was able to avoid disclosing more than a few thousand pages of internal documents, keeping intact an impregnable wall of silence.[11] That wall would show its

---

[9] Memorandum by R. J. Reynolds' attorney J. Michael Jordan, April 29, 1988, *quoted in* Haines v. Liggett Group, Inc., 814 F. Supp. 414, 421 (D.N.J. 1993).

[10] Robert L. Rabin, "A Sociolegal History of the Tobacco Tort Litigation," 44 *Stanford Law Review* 853, 857 (1992).

[11] Roberta B. Walburn, "The Role of the Once-Confidential Industry Documents,"25 *William Mitchell Law Review* 431, 432 (1999).

first cracks in the landmark *Cipollone* case,[12] and would be completely breached by the end of the 1990s.

Crack in the Wall

Without exception, the hundreds of cases of the second wave of litigation, like those of the first, would fail. But one of these failures would prove pivotal. *Cipollone v. Liggett Group, Inc.*,[13] a personal injury case filed in 1983 on be half of New Jersey smoker and lung cancer victim Rose Cipollone and her husband Tony, would set the stage for later successes.

Filed by an imaginative, tireless and experienced litigator, and funded at a level beyond that of earlier cases, *Cipollone* appeared bright with promise. Plaintiff's case focused aggressively on gaining access to industry documents, and did so with a new level of energy and sophistication. At the same time, the case tested the limits of the available causes of action, in light of industry arguments that smokers' claims were grounded in state law, and had therefore been preempted, or barred, by the national legislation that had introduced cigarette warning labels in 1965.

Plaintiff's attempts to uncover industry documents won only limited success. But the small cache of documents that was released contained damning indications of wrongdoing. Other documents, never disclosed, were apparently even more disturbing: when the presiding judge in a related case reviewed them *in camera* (without providing them to plaintiff or the public), the judge was to become so angered that he would be removed from the case by a higher court after he labeled the tobacco industry "the king of concealment and disinformation," and asked:

> **[w]ho are these persons who knowingly and secretly decide to put the buying public at risk solely for the purpose of making profits and who believe that illness and death of consumers is an appropriate cost of their own prosperity![14]**

---

[12] Cipollone v. Liggett Group, Inc., 683 F. Supp. 1487 (D.N.J. 1988); Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992).

[13] *Id.*

[14] Haines v. Liggett Group, Inc., 140 F.R.D. 681, 683 (D.N.J. 1992); Haines v. Liggett Group, Inc., 975 F. 2d 81 (3rd Cir. 1992).

Those documents that were released in *Cipollone* would contribute to an historic result: by the time the case came to trial in 1985, Rose Cipollone had succumbed to her cancer, but the jury was to award her husband Tony $400,000, the first plaintiff's verdict in thirty years of courtroom battles. The tobacco industry's long record of success was broken.

This symbolic victory would prove short-lived, however. Apparently persuaded by the manufacturers' traditional argument that smokers freely accept the risk of smoking, the jury had found Rose Cipollone to be at fault, even as it had awarded damages to her husband — an inconsistency that put the award at risk. Moreover, post-trial appeals on the issue of federal preemption would reach the U.S. Supreme Court, which was to rule, in a divided opinion, that plaintiffs are indeed barred from asserting claims based on theories of negligence or failure to warn. The Supreme Court's 1992 decision set aside the jury verdict, leaving the case open for re-trial on the surviving causes of action.

In the wake of this mixed result, *Cipollone* soon ground to an ignominious end, symbolic of the fate of most tobacco litigation, before and since. Nine years after filing the case, a weary plaintiff's attorney was forced to abandon the effort, as his law partners refused to fund still more years of crushing expense. Already they had expended some $3 million, with reimbursement nowhere in sight. Tobacco companies had poured an estimated $50 to $75 million into the defense and appeared content to spend at that level indefinitely.[15] Rose Cipollone had been dead for seven years.

At its conclusion in 1992, *Cipollone* stood as a potent metaphor for the extraordinary difficulty of tobacco litigation. Hundreds of cases had been fought. Millions of dollars had been spent. Decades had passed. Most of the plaintiffs had died. Not a penny had been won. As *Cipollone* showed, even the best-conceived, hardest-fought, multi-million dollar case could come to naught.

And yet, paradoxically, the case hinted unmistakably at the potential for a breakthrough victory. The jury's verdict, however muddled, showed the power of industry documents to sway results. The Supreme Court's decision, while closing the door to traditional negligence claims, virtually invited claims based on misrepresentation and intentional tort, if they could be substantiated. Moreover, the case clearly suggested that a strategic, disciplined and well-funded approach, focused on the

---

[15]*See* Robert L. Rabin, "The Third Wave of Tobacco Litigation," in Robert L. Rabin and Steven Sugarman, Eds., *Regulating Tobacco* (New York, Oxford University Press, 2001),176-79; and Peter Pringle, *Cornered: Big Tobacco at the Bar of Justice* (New York, Henry Holt and Company, 1998) at 39-41.

industry's misconduct, might yield results unlike anything previously achieved, and hinted that the key to success might lie in industry documents yet unseen. Plaintiffs' attorneys were not to miss these lessons.

New Wave

In the aftermath of *Cipollone*, three factors would quickly converge to give rise to a new "third wave" of cases that would alter the dynamic of tobacco litigation forever. While many of these "third wave" cases would ultimately fail, some would succeed, and in the process would change public perceptions and demonstrate the potential power of litigation as a public health tool. This development was the result of three factors: (1) an avalanche of revelations about tobacco company misconduct, (2) the emergence of new forms of litigation that allowed plaintiffs to amass resources and expertise on a scale sufficient to challenge the industry's litigation juggernaut, and (3) the development of new legal theories that avoided many of the tobacco industry's traditional victim-blaming defenses.

The relative handful of industry documents uncovered in the *Cipollone* litigation had hinted at what might be contained in sealed industry files. That hint was to be confirmed in early 1994, as a trickle, and then a stream, of revelations emerged from two industry "whistleblowers." A paralegal for a law firm representing British American Tobacco subsidiary Brown & Williamson Corporation copied and leaked damaging documents that were soon disseminated and analyzed in publications ranging from the *Wall Street Journal* to a special issue of the *Journal of the American Medical Association.*[16] Meanwhile, a former Brown & Williamson research director had begun cooperating with federal regulatory authorities. Enterprising investigative journalism and public inquiries soon turned their stream of revelations into a torrent.

In particular, the U.S. Food and Drug Administration, under the leadership of its then-Director, Dr. David Kessler, began an investigation of evidence that manufacturers had controlled and manipulated the levels of nicotine in cigarettes, a practice that would not only have increased the products' addictiveness, but also arguably brought cigarette manufacturers under the regulatory authority of the federal government for the first time. The FDA's subsequent assertion of jurisdiction was ultimately unsuccessful.[17]

---

[16] *See generally*, Stanton A. Glantz, John Slade, Lisa A. Bero, Peter Hanauer and Deborah Barnes, *The Cigarette Papers* (Berkeley, University of California Press, 1996), available online at http://galen.library.ucsf.edu/tobacco/.

[17] Food and Drug Administration v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

Nevertheless, it served to inform public opinion and, together with insider revelations, led directly to an historic public inquiry in the U.S. House of Representatives, which forever altered public perceptions with the indelible image of seven tobacco company chief executive officers, right arms raised, swearing to tell the truth and then denying that cigarettes addict smokers or cause disease.

Together, the flood of evidence produced by the Congressional inquiry, the FDA investigation, investigative reporting and insider revelations offered insights into what appeared to be a vast conspiracy, ranging far beyond the tobacco industry's traditional denial that cigarettes cause disease, and including far-reaching efforts to manipulate cigarette's addictiveness, subvert scientific understanding, target adolescent children and manipulate public policy. As the *Journal of the American Medical Association* urged its readers:

> **...[T]hese documents and the analyses merit ... careful attention ... because they provide massive, detailed, and damning evidence of the tactics of the tobacco industry. They show us how this industry has managed to spread confusion by suppressing, manipulating, and distorting the scientific record. They also make clear how the tobacco industry has been able to avoid paying a penny in damages and how it has managed to remain hugely profitable from the sale of a substance long known by scientists and physicians to be lethal.**[18]

These revelations were to mark a turning point. Whatever unsubstantiated theories plaintiffs' lawyers may have had about manufacturers' conduct, whatever clues the *Cipollone* case might have provided, these new revelations offered real evidence, the kind of evidence on which cases could be built.

Equally critical was the emergence of new forms of tobacco litigation involving monetary claims on a scale far beyond those of earlier cases. By invoking the interests of governments and other large institutions, or by aggregating claims of individual victims, these new approaches were to enable plaintiffs to marshal resources that, while still far short of those of the defendants, greatly exceeded anything previously assembled.

---

[18] Todd, J.S., *et al.*, "The Brown and Williamson Documents: Where Do We Go From Here?" *The Journal of the American Medical Association*, Vol. 274, No. 3, (July 19, 1995), at 256.

By the early 1990s, the aggregation of numerous personal injury claims into sweeping "mass tort" cases had become an established feature of the U.S. judicial landscape, at least in certain specialized areas, including cases stemming from air crashes, fires and other disasters, and "toxic torts" claims against manufacturers of dangerous products, including asbestos, pharmaceuticals and medical devices. Rules of litigation in both state and federal courts in the U.S. allowed the consolidation of individual cases as "class actions" where an identifiable class of individual claimants had all suffered similar injuries under similar factual circumstances, and where common legal questions predominated. Whether a given case qualified for such treatment, and how individualized issues of damages, reliance and so on would be determined within a given class, always presented complex challenges, but the availability of consolidated treatment for part or all of these claims shifted the balance of power and incentives for potential claimants and, more importantly, for their attorneys.

Litigation against a product manufacturer in the U.S. would be prohibitively expensive for all but the wealthiest individual victims, if not for the availability of "contingent fee" arrangements, in which a plaintiff's attorneys absorb the cost and risk of litigation in exchange for an agreed percentage of any eventual recovery; it is these fee arrangements that make such claims economically viable. In the case of tobacco victims, the industry's scorched-earth defenses had increased the price of most individual litigation far beyond any fee an attorney might reasonably hope to recover, at least at that time. *Cipollone*, in which tobacco companies had shown their willingness to spend a hundred times the amount of the eventual jury verdict, stood as a vivid lesson in economics.

But aggregated cases offer economies of scale. The cost of proving common issues of liability, for example, can be spread across thousands of claims, making the case affordable for the first time. The potential recovery — and the potential fee — is suddenly so large as to justify the investment of unprecedented resources.

Scores of specialized plaintiffs' attorneys had mastered these calculations in the course of litigation against asbestos manufacturers, airlines and others through the 1980s, and had become immensely wealthy in the process. Sometimes their clients, the victims, had benefited as well. On other occasions, the clients' interests had been forgotten or trampled, as class action cases were settled on terms that rewarded plaintiffs' counsel with lucrative fees and allowed defendants to escape liability on favorable terms, while leaving individual victims without further recourse.

As revelations began to flow in the early 1990s, plaintiffs' attorneys turned their attention, and their considerable resources, to tobacco. Recognizing the enormous

stakes, they began to fashion new cases on a scale that would permit the assembly of funds and personnel on an unprecedented scale, and allow them to go toe-to-toe with the industry. One flamboyant consortium of sixty multimillionaire mass tort lawyers, gleefully describing themselves as "buccaneers," contributed $100,000 each to a $6 million fund to launch what some dubbed "The Mother of All Lawsuits."[19] Meanwhile, several state governments and other large institutions had begun to consider possible claims, and to assemble legal teams, public and private. Suddenly, the playing field was being leveled.

The third factor permitting this transformation was the development of new legal claims that promised to bypass, or at least minimize, the tobacco industry's traditional argument that plaintiffs had freely accepted the risks of smoking. These "assumption of risk" and "comparative fault" arguments were becoming less persuasive as evidence grew that tobacco was addictive, and that tobacco companies understood, exploited and even enhanced this addiction. Mounting awareness that almost all smokers become addicted before reaching adulthood, and that manufacturers carefully target underage youth, further undercut claims that smokers were to blame for their own illnesses. Most importantly, plaintiffs began to focus on the injuries incurred not by smokers themselves, but by governments and other third parties who treat smokers' illnesses. To the extent these third parties suffered direct injuries, independent of those suffered by the smokers themselves, they could hardly be said to have voluntarily incurred the risk of smoking and its resulting diseases. And their claims were of a scale sufficient to justify all-out litigation.

The combined effect of these three developments — the emergence of new evidence, the assembly of new resources and the development of new legal theories — was powerful. Together they would launch the third wave of litigation that continues today. In truth, this "wave" is an eclectic collection of several very different types of litigation. What unites them is that they build on the documentary evidence accumulated in previous cases, they tend to rest on a more sophisticated understanding of the defendants, and above all, they focus less on the effects of the product, the cigarette, than they do on the conduct of the manufacturers.

---

[19] Peter Pringle, *Cornered: Big Tobacco at the Bar of Justice* (New York, Henry Holt and Company, 1998) at 3-6.

Government Actions

The most influential of the "third wave" cases have been a series of lawsuits filed by the states of the United States, beginning in 1994. Over the following four years, almost every state would file an action, resulting, by 1998, in five massive settlements covering all fifty states.20 Several cities and counties would participate in state cases or file their own. These cases alleged a long-running, multi-faceted conspiracy by tobacco manufacturers to mislead smokers, the general public, and public officials. They sought sweeping injunctive and equitable relief, and unprecedented monetary recoveries for penalties, punitive damages and recovery of sums spent by the states to treat smokers' illnesses.

These cases asserted a wide array of causes of action. Most were law enforcement actions, emphasizing industry conduct and alleging civil violations of state laws, including consumer protection, advertising, competition ("antitrust") and racketeering statutes, as well as related tort and equitable theories. Other cases rested more heavily on theories of product liability and equity, such as unjust enrichment. Significantly, these were not derivative or "subrogation" cases brought on behalf of smokers to vindicate their individual interests, but rather direct actions to redress the injuries to states and the violations of state laws. This meant that smokers' conduct, or their knowledge of the health risks, was not a defense, and that it was unnecessary to prove individual reliance on industry representations.[21]

By late 1998, these cases were resolved in the five largest settlements in the history of litigation — individual settlements with the states of Mississippi, Florida, Texas and Minnesota, and a "Master Settlement Agreement" with the remaining forty-six states.[22] The terms of these five settlements, more than any of the hundreds of other cases in fifty years of worldwide tobacco litigation, have excited global interest in the possibility of similar litigation elsewhere.

---

[20] *See generally*, Roberta B. Walburn, "The Prospects for Globalizing Tobacco Litigation," paper presented at WHO International Conference on Global Tobacco Control, New Delhi, India, 7-9 January 2000, http://tobacco.who.int/repository/tld94/ROBERTA2000X.doc.

[21] *See, e.g.*, Gary L. Wilson and Jason A. Gillmer, "Minnesota's Tobacco Case: Recovering Damages Without Individual Proof of Reliance Under Minnesota's Consumer Protection Statutes," 25 *William Mitchell Law Review* 567 (1999).

[22] The texts of the state settlements are available online at http://www.library.ucsf.edu/tobacco/litigation/states.html.

Much of this interest, at least initially, flows simply from the staggering size of the financial recoveries. The forty-six-state Master Settlement Agreement provides for payment of $206 billion over twenty-five years. The four states settling separately will receive another $40 billion. The size of these figures has had an intoxicating effect on some observers, prompting the wishful thought that tobacco litigation offers an easy path to unlimited windfalls.

Unfortunately, similar financial recoveries may be unlikely in most other legal systems. The massive recoveries in the state settlements were due in large measure to a unique confluence of factors unlikely to reappear in the same form in most other legal systems. These factors included: the availability in the U.S. of contingent fee arrangements; the absence of a "loser pays" rule; the involvement of the right combination of litigation experts and public officials; U.S. juries' acceptance of litigation as a means for resolving "social" or "political" issues; and fortuitous timing, in that the tobacco industry's urgent desire to influence then-pending proposals in the U.S. Congress created pressure for it to settle on generous terms. While this combination of factors may never be repeated, the state settlements do stand for the fact that large recoveries may be possible in the right circumstances.

Perhaps more important for observers outside the U. S., however, are the non-monetary aspects of the settlements. Above all, the recovery and release of some thirty-five million pages of tobacco industry documents in the course of the litigation by the State of Minnesota demonstrates the power of litigation to re-frame public debate on issues of tobacco and health, and to advance comprehensive tobacco control. The Minnesota documents, many of which are now available on the Internet, represent only a portion of the documents that were sought in the case, and are drawn from only a handful of companies. Yet they continue to yield startling revelations about activities of manufacturers in every region of the globe, and to hint at what may reside in industry files still unseen.

In addition, the state settlements contained elaborate injunctive and equitable provisions testifying to the potential power of litigation to force changes in the business practices of tobacco manufacturers and even to fashion new regulatory regimes. Among the innovative requirements of the settlements were provisions ending most outdoor cigarette advertising, banning the use of merchandise with cigarette brand names, and limiting sponsorships. The industry was formally prohibited from targeting youth in its advertising and from engaging in anti-competitive practices. Trade groups were forced to disband. The industry was forced to file periodic reports on its lobbying activities. Several foundations were created, and provided with funds for ongoing

tobacco control efforts. In some states, lawmakers have dedicated portions of the financial recovery to comprehensive tobacco prevention programs.

In the footsteps of the state lawsuits, the U.S. Department of Justice in 1999 filed a wide-ranging civil lawsuit resting on allegations similar to those of the state actions and seeking recovery of federal health care costs.[23] A year later, the cost reimbursement counts of the original complaint were dismissed,[24] but the government was allowed to proceed on its civil claims arising under the Racketeer Influenced Corrupt Organizations Act (RICO), a sweeping statute originally enacted as a tool against the activities of organized crime. After initially expressing doubts about the merits of the case, the current U.S. Administration has stated its intention to allow the litigation to proceed. While the fate of the suit, and the depth of the government's commitment to it, remain unclear, the surviving legal count is considered sufficient, in theory, to permit the government to present the full range of evidence, and to seek the full range of relief, contemplated in the original filing.

Class Actions

A second important form of "third wave" litigation involves class action suits, in which the similar claims of many victims are combined. Here the results to date are decidedly mixed, but two cases have achieved dramatic interim results that suggest the potentially cataclysmic power of class-based claims.

With great ceremony and fanfare, the "*Castano* group" of sixty colorful attorneys had helped launch the third wave of litigation by filing the massive "Mother of All Lawsuits" that for a time dominated attention in tobacco litigation, *Castano v. American Tobacco Company.*[25] A would-be nationwide action on behalf of as many as forty million smokers, and possibly the "largest class action ever attempted in federal court,"[26] *Castano* rested on issues of addiction, seeking to represent not just the fraction of smokers who have developed illnesses, but rather all smokers who are

---

[23] United States v. Philip Morris, No. CIV. A 99-2496(GK) (D.D.C. 1999).

[24] United States v. Philip Morris, Inc. 116 F. Supp. 2d 131 (D.D.C. 2000) and United States v. Philip Morris, Inc., 156 F. Supp. 2d 1 (D.D.C. 2001).

[25] Castano v. American Tobacco Company, 160 F.R.D. 544, (E.D. La. 1995), *reversed,* 84 F. 3d 734 (5th Cir. 1996).

[26] Castano v. American Tobacco Company, 84 F. 3d, 734, 737 (5th Cir. 1996).

addicted to nicotine. It sought damages for medical monitoring and emotional distress, along with disgorgement of the industry's profits.

In 1996, this ambitious effort fell apart when the case was "decertified" (found to be inappropriate for consolidated litigation) on the ground that variations among state laws made a nationwide class inappropriate. Plaintiffs' attorneys responded by filing many new "son of *Castano*" class actions on a state-by-state basis, but these, too, have almost without exception languished in state courts or have themselves been decertified on the grounds that too many individualized issues of law and fact are involved.[27] Neither of the two cases certified as class actions has yielded success.[28]

Castano and its progeny might have justified the impression that class actions are not a viable approach to tobacco litigation, if not for the outcomes of two other class actions filed in Florida state courts by a dogged husband and wife attorney team unconnected to the *Castano* group. The first of these cases, *Broin v. Philip Morris Companies,*[29] filed in 1991, was a daring action, alleging then-novel claims on behalf of nonsmoking airline flight attendants injured by their exposure to second-hand smoke. Unlike *Castano, Broin* was certified by appellate courts as a nationwide class, with determination of individual damages or state law variations deferred for later adjudication. The case proceeded to trial on common issues of liability, where plaintiffs faced difficult issues of proof. Before trial was concluded, the case was settled on terms that paid no damages to individual class members, but authorized the filing of new individual cases on advantageous terms, with defendants waiving statute of limitations (timeliness) defenses and accepting the burden of proof on key questions of causation. In addition, defendants agreed to pay $300 million to fund a medical research foundation.

Second, and even more dramatic, is *R.J. Reynolds Co. v. Engle,*[30] a state class action on behalf of all addicted Florida smokers injured by tobacco-related diseases. After appellate courts upheld certification of the class, a "phase-one" trial of a year and a day

---

[27]*See* Susan Kearnes, "Decertification of Statewide Tobacco Class Actions," 74 *New York University Law Review* 1336 (1999).

[28]The only "son of *Castano*" case to be tried, In Re: Tobacco Litigation (Medical Monitoring Cases) (Ohio County Circuit Court, W. Va.), resulted in a jury verdict for the defendants in November 2001. The only other *Castano*-style class action to be certified remains pending in Louisiana.

[29] Broin v. Philip Morris Companies, Inc., 641 So. 2d 888 (Fla. App. 1994), *review denied,*, 654 So. 2d 919 (Fla. 1995).

[30] R. J. Reynolds Tobacco Co. v. Engle, 672 So. 2d 39 (Fla. App. 1996), *review denied*, 682 So. 2d 1100 (Fla. 1996).

determined the common issues of liability, with the jury finding in 1999 that cigarettes are addictive and cause some twenty diseases or medical problems; that tobacco companies are liable for negligence, recklessness and breach of warranties; that they have committed fraud and have conspired to mislead the public; and that punitive damages are warranted. In phase-two proceedings, three representative members of the class were awarded individual damages totaling $12.7 million. Then, in 2000, before beginning individualized damage determinations for hundreds of thousands of class members, the jury determined punitive damages for the entire class, and awarded the heart-stopping sum of $145 billion.

If sustained, the *Engle* verdict would not only compensate victims, but alter industry behavior, raise the price of cigarettes and change the litigation environment forever. Whether this award will survive appeals is uncertain. Large punitive damage awards are routinely reduced following trial. Here, given a number of procedural and substantive issues, it is possible that the entire award could be set aside, or even that *Engle* could be overturned altogether.

But whatever the eventual outcome, *Engle,* like *Broin,* has already demonstrated the potential power of aggregated claims,[31] and has inspired still more class action litigation. In late 2001, some twenty-eight would-be class actions were pending.[32] By the end of 2001, courts had certified four new class actions involving the consumer protection laws of California, Illinois and Massachusetts.[33]

Individual Cases in the Third Wave

In addition to large-scale aggregated claims, the third wave has transformed individual litigation, which continues unabated. While the compensatory damages at issue remain

---

[31]At the same time, *Broin* and *Engle* illustrate the tradeoffs inherent in class action litigation. Individual class members have little control over the course of their claims; indeed, many may not even realize they are being "represented." Some flight attendants included in the *Broin* class, for example, felt the settlement betrayed their interests, while others believed it had won major concessions that greatly increased their ability to assert successful claims individually. (Some 2900 post-*Broin* individual flight attendant lawsuits were pending in late 2001.) As this debate shows, class action litigation leaves individual victims dependent on the good intentions of class counsel, and the sometimes-unreliable oversight of the court, to ensure that the outcome truly serves their interests.

[32]Philip Morris Companies, Inc., S.E.C. Form 10-Q for period ending September 30, 2001, available online at http://www.sec.gov.

[33]See case update prepared by the Tobacco Control Resource Center of Northeastern University School of Law at http://www.tobacco.neu/Upcoming.html.

small in comparison to those in government cases and class actions, the availability of industry documents, the sharing of information among practitioners, and a changing climate of public opinion have altered the risk-reward calculus and have led to the first successes in individual tobacco litigation.[34] Moreover, in a string of decisions since 1999, juries have shown a new, and surprisingly consistent, willingness to grant large sums in punitive damage awards which, if sustained by appellate courts, will make individual litigation even more attractive.

These new individual cases share several characteristics. Most importantly, they rely heavily on the industry documents to tell a compelling narrative of industry behavior. Because this story remains largely constant across cases, attorneys can realize economies of scale in case preparation. With each new courtroom victory, they are able to refine the evidence and arguments, further increasing the chances for future successes.

This is not to suggest that tobacco companies have in any way relaxed their scorched-earth tactics, or that juries are no longer receptive to the industry's victim-blaming arguments. On the contrary, of approximately twenty-five individual cases reaching juries since 1996, the great majority have still resulted in victories for defendants. But in eight of those cases, juries have returned verdicts for the plaintiff -- a record that shatters the tobacco industry's previously unbroken history of hundreds of victories. Even more significant is the fact that, in five of the eight cases, juries have granted large punitive damage awards.[35]

At this point, these are provisional successes: all but one of the plaintiffs' verdicts remains on appeal. Clearly, individual litigation remains an expensive, high-risk, unpredictable venture. But the fact that these cases now appear to have significant chances of success with juries, and just as importantly, the new willingness of juries to award punitive damages, testify to the persuasive power of the industry documents and the changing climate produced by evolving public opinion.

Individual tobacco litigation appears to be in a period of transition, as juror attitudes and opinions continue to evolve, and as appellate courts sort out the role of punitive damages in these cases. Whether the mixed results of recent years represent a

---

[34] *See generally*, Robert L. Rabin, "The Third Wave of Tobacco Litigation," in Robert L. Rabin and Steven Sugarman, Eds., *Regulating Tobacco* (New York, Oxford University Press 2001),195-97.

[35]These punitive damage awards, which currently total approximately $175 million, are all currently on appeal. Most have already been reduced by trial judges or appellate courts, as commonly occurs. The awards may be further reduced, or reversed, as appeals continue.

transition toward even greater jury support for injured smokers remains to be seen, but the fact that these cases now offer a genuine possibility of success, and even of large punitive damage awards, has tipped the risk-benefit scales and made these cases more economically viable than ever. Perhaps not surprisingly, 250 individual cases are now pending in U.S. courts.[36]

Other Third Wave Litigation

The eclectic third wave also includes an assortment of other cases. Most prominent of these are cases involving third-party payers of medical expenses, including private insurers and trade union health benefit funds. Although these cases involve huge claims, they have had very limited success.[37] Many have been dismissed for lack of standing, on the ground that the injuries claimed are too remote.[38] Courts that might have upheld the standing of governments to assert direct claims for the cost of treating smokers have shown far greater reluctance to extend this reasoning to the similar claims of private third parties. Approximately fifty private cost recovery actions remain pending,[39] but the only such case to reach trial has yielded a hollow victory. That action resulted in a June 2001 verdict for the plaintiff, the largest private health care insurer in the State of New York, but the amount of the verdict -- $17.8 million -- was so small in relation to the cost of the litigation and the $3 billion in damages alleged, that it is unclear whether the outcome will encourage or discourage similar cases.[40]

In addition, asbestos manufacturers have filed suits seeking contribution from tobacco companies for the role of cigarettes in causing or aggravating the cancers of asbestos victims. Fire victims have sued for the failure of manufacturers to make cigarettes self-extinguishing. Finally, governments of some other nations have filed litigation in the

---

[36]Philip Morris Companies, Inc., S.E.C. Form 10-Q, for period ending September 30, 2001, available online at http://www.sec.gov.

[37]The sole clear exception is a $469 million settlement recovered by Minnesota's largest private health care plan, Blue Cross and Blue Shield of Minnesota, a co-plaintiff in the Minnesota state litigation.

[38]*See, e.g.* Lyons v. Philip Morris, Inc., 225 F. 3d 909 (8th Cir. 2000); Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc. 185 F. 3d 957 (9th Cir. 1999); Texas Carpenters Health Benefit Fund v. Philip Morris, Inc., 199 F. 3d 788 (5th Cir. 2000).

[39]Philip Morris Companies, Inc., S.E.C. Form 10-Q for period ending September 30, 2001, available online at http://www.sec.gov. A number of cases filed by Blue Cross and Blue Shield health care plans remain before a federal district court in New York.

[40]Empire Blue Cross and Blue Shield v. Philip Morris, Inc. (No. 98 CV 3287) (E.D. N.Y.) (Verdict of June 4, 2001).

United States, either to recover health care costs or for relief related to the alleged role of cigarette manufacturers in global tobacco smuggling schemes. A number of these cases have been dismissed.[41]

Upshot

The third wave of litigation in the U.S. has produced dramatic successes that invite, and almost obligate, the public health community to consider how this tool might be employed globally. Yet it is important to remember that these relatively isolated successes are not the norm. In fact, they stand in contrast to the results of most third wave litigation, even today. Of hundreds of third wave cases, only a handful have succeeded: five state settlements; *Broin*; fewer than ten individual verdicts (all but one of which remain on appeal); and the massive *Engle* award (which may or may not survive appeals).

Why these cases succeeded — indeed, whether they should all be considered successes — when other cases continue to fail, remains the subject of debate, even among participants. In this environment, the lessons for other countries are neither simple nor self-evident. This makes it crucial that litigation be approached carefully, and that adequate resources be assembled to assist Member States in understanding the lessons of the U.S. experience for their own legal traditions.

---

[41] *See* note 84 below.

III. LITIGATION: THE GLOBAL EXPERIENCE

Outside the United States, experience with tobacco litigation is far less extensive, and no consistent patterns yet exist. Almost all cases filed outside the United States were filed within the last decade; most are still pending. None of these cases has yet produced a large financial recovery, and, until very recently, none had achieving a sweeping social impact. In fact, there had been few successes of any kind.

This situation is now changing dramatically and at an amazing speed. Recent decisions have shown that, under the right combination of circumstances, litigation can advance tobacco control dramatically in countries with widely varying legal systems. In particular, recent landmark decisions in India hold the potential to alter the social environment more profoundly than any litigation has done in the U.S., and to set a model for litigation elsewhere. A new suit in Saudi Arabia will bring the issues of health care cost recovery litigation, for the first time, to an Islamic court. Innovative cases in Bangladesh and Uganda are showing that even without substantial funding, creative, well-conceived litigation can shape policy and public opinion. State-of-the-art litigation by employees is advancing second-hand smoke protection in Australia and Norway. Pending health care reimbursement litigation and smuggling cases in several jurisdictions, if successful, may generate financial recoveries comparable to those in the U.S. health care cost recovery litigation.

Tobacco cases of one sort or another have been brought before the courts of Australia, Bangladesh, Brazil, Canada, China, Finland, France, Germany, India, Ireland, Israel, the Marshall Islands, Pakistan, Japan, Norway, Oman, Peru, Poland, South Korea, Spain, Sri Lanka, Switzerland, Uganda and the United Kingdom.[42] At least eighty cases are currently pending in eleven countries.[43] Governments of a number of countries have also filed lawsuits in the courts of the U.S., although these cases have received a cold

---

[42]*See generally*, Roberta B. Walburn, "The Prospects for Globalizing Tobacco Litigation," paper presented at WHO International Conference on Global Tobacco Control, New Delhi, India, 7-9 January 2000, available online at http://tobacco.who.int/repository/tld94/ROBERTA2000X.doc, and Richard A. Daynard, "How Might Tobacco Litigation Promote Health Worldwide ... and What Has Been Achieved So Far?" paper presented at the Amman Consultation. *See also* Richard A. Daynard, Clive Bates and Neil Francey, "Tobacco Litigation Worldwide," 320 *British Medical Journal* 111 (2000), and, generally, the papers presented in Amman.

[43]Philip Morris Companies, Inc., S.E.C. Form 10-Q for period ending September 30, 2001, available online at http://www.sec.gov.

reception.[44] While it is not possible to present here a comprehensive inventory of litigation worldwide, a sampling of cases will illustrate the surprising diversity of global approaches.

Australia

No country outside the U.S. has had more experience with tobacco litigation than Australia. While the rules of Australian litigation have hampered litigation on behalf of Australian smokers, a series of pioneering cases involving exposure to second-hand smoke has advanced this issue worldwide.[45] These have included:

Australian Federation of Consumer Organizations v Tobacco Institute of Australia, [46]a groundbreaking 1991 decision, following 100 days of hearings, holding that tobacco industry advertisements disputing the harmful effects of second-hand smoke were misleading and deceptive — a decision that helped alter public understanding of the dangers of second-hand smoke not only in Australia, but around the world.

- Scholem v. Department of Health, a 1992 decision in the District Court of New South Wales, awarding a nonsmoker $85,000 in compensation for respiratory problems caused by smoke in her workplace — the world's first jury verdict on behalf of a victim of second-hand smoke.

Beasley v. P & O Cruise Lines, a 1994 action in the Local Court of New South Wales, in which a nonsmoking cruise passenger recovered $3500 in compensation after a cruise line falsely promised a non-smoking cruise.

Meeuwissen v. Hilton Hotels of Australia, Ltd,[47] a disability discrimination case in which a claimant with asthma was awarded $2000 compensation after she was effectively excluded from a smoky nightclub by the presence of smoke.

Bowles v. Canton Pty., Ltd., a September 2000 decision of the Melbourne Magistrate's Court, involving a consumer whose exposure to smoke in a restaurant triggered a

---

[44]*See* note 84 below.

[45]Information concerning Australian litigation is drawn primarily from Neil Francey, "Tobacco Litigation: The Australian Experience in a Global Context," paper presented at the Amman Consultation.

[46]27 FCR 149 (1990). *On appeal*, Tobacco Institute of Australia, Ltd. v. Australian Federation of Consumer Organizations, Inc., 38 FCR 1 (1992), and Tobacco Institute of Australia, Ltd. v Australian Federation of Consumer Organizations, Inc., 41 FCR 89 (1993).

[47] [1997] HREOCA 56 (25 September 1997).

severe asthmatic attack and six weeks of respiratory problems. The court found the restaurant negligent and in breach of its duty to provide its guests a safe environment, awarding the consumer some $4,000 for her pain, suffering, medical expenses, and loss of income.[48]

- Sharp v. Port Kembla RSL, a groundbreaking decision of the Supreme Court of New South Wales in May 2001, awarding $242,000 in compensation to a non-smoking worker who developed throat cancer after working for eleven years in a smoky bar.49

Other Australian litigation has had less success. Efforts to force international airline flights to eliminate smoking,[50] and to compel a cigarette manufacturer to reimburse a smoker for the cost of quitting,[51] were rejected for inadequate proof of damages.

Significantly, Australian procedural standards have so far blocked efforts to bring aggregated claims for damages. Although Australian courts allow the aggregation of individual claims through "representative proceedings," they also adhere to the principle of "loser pays" and limit the use of contingent fees. Two very large representative proceedings commenced in 1999, and later consolidated, made allegations similar to those of the health care cost reimbursement in the U.S., but were ultimately not allowed to proceed as an aggregated case, effectively ending the litigation.[52] A separate representative proceeding, *Tobacco Control Coalition, Inc. v. Philip Morris (Australia), Ltd., et al., No. N1089 of 1999*, was brought on behalf of health and medical organizations and smokers who had not developed diseases, with a later attempt to add claims on behalf of States, Territories and other payers of health

---

[48] "Legal Smoke Signal for Hotels, Clubs," *Adelaide Advertiser*, 14 September 200, http://www.theadvertiser.news.com.au/common/story_page/0,4511,1195917%255E911,00.html.; "Café Smoke Victim Wins Payout," *The Age*, 14 September 2000, http://theage.com.au/news/20000914/A63866-2000Sep13.html.

[49] "Passive Smoking Caused Barmaid's Cancer," *Sydney Morning Herald*, 2 May 2001, http://smh.com.au/news/0105/02update/news15.html; "Australian Bar Worker Wins Payout in Passive Smoking Case," 322 *British Medical Journal* 1139 (12 May 2001).

[50] Leonie Cameron v Qantas Airways, Ltd., 66 FCR 246 (1996).

[51] W. D. & H. O. Wills (Australia), Ltd. v. Consumer Claims Tribunal of New South Wales, ASAL 55-012 (1998).

[52] Nixon, et al. v. Philip Morris (Australia), Ltd., et al., ATPR 41-707 (1999). *On petition for leave to appeal*, Nixon, *et al.* v. Philip Morris (Australia), Ltd., *et al.* S38/2000 (21 June 2000).

care costs. Taking advantage of Australian "loser pays" rules, the respondents succeeded in obtaining an order that the Tobacco Control Coalition post security of $300,000 to guarantee payment of the respondents' costs — a decision that, in the event, resulted in the dismissal of the action when security could not be posted.[53]

Bangladesh

Litigation in Bangladesh illustrates the ability of a creative, carefully-targeted court action to leverage social change, even in the face of procedural hurdles and resource limitations.[54] Settled tort law, the unavailability of class actions and the difficulty of proving damages make damage actions costly and difficult in Bangladesh. With this in mind, advocates there fashioned creative "public interest writ litigation" in equity to advance tobacco control. The case involved the use by British American Tobacco (BAT) of a touring luxury yacht as a promotional vehicle for its cigarettes. Invoking the right to life and liberty guaranteed by the Constitution of Bangladesh, petitioners were able to establish that the BAT yacht constituted an "advertisement" and that, more broadly, the use of any advertisement for cigarettes without appropriate health warnings offended the constitutional right to life. This ruling, which was still under review before the nation's highest court at the time of the Amman Consultation, helped speed the formation of a national coalition of non-governmental organizations committed to tobacco control, and the development of proposed comprehensive national legislation.

Canada

A large and important case currently pending in the Canadian Province of British Colombia offers a model for health care cost recovery litigation grounded in specific statutory authority.[55] As the provider of universal health care insurance for its residents, British Colombia in January 2001 sued tobacco manufacturers to recover sums it has expended to treat smokers for smoking-related disease. The lawsuit is authorized by

---

[53] For a detailed analysis of problems with the decisions in this case, see Neil Francey, "Tobacco Litigation: The Australian Experience in a Global Context," paper presented at the Amman Consultation, at 13 – 24.

[54] Information concerning litigation in Bangladesh is drawn from Tania Amir, "Opportunities and Obstacles for Litigation in Bangladesh," presentation at the Amman Consultation

[55]Information concerning Canadian health care cost recovery litigation is drawn from Daniel A. Webster, "Public Claims Authorized by Statute: Canada," paper presented at the Amman Consultation. Information concerning other pending Canadian litigation is drawn from Rob Cunningham, Canadian Cancer Society, "Background on Tobacco Liability Lawsuits in Canada," December 17, 2001.

the Tobacco Damages and Health Care Cost Recovery Act of 2000, (itself a revision of an earlier Act, following a constitutional challenge in the British Colombia Supreme Court) provincial legislation specifically empowering the provincial government: to assert a direct (*i.e.*, not subrogated) claim against tobacco manufacturers; to assert its claim against the manufacturers, collectively; to use epidemiological and statistical evidence of causation and damages; and to apportion any liability among manufacturers on the basis of common law or equitable principles.[56] Other Canadian provinces have adopted, or are considering, other models for such health care cost recovery legislation. Legislation such as that in British Colombia offers one model for resolving some of the most challenging procedural difficulties of cost recovery litigation, including issues about the relevance of "assumption of risk" and other traditional industry defenses; issues of disease causation and calculation of damages; issues of apportionment of liability among manufacturers; and, potentially, statute-of-limitations issues.

In addition to the British Colombia case, a 1999 health care cost recovery action by the Province of Ontario remains on appeal in the U.S. after having been dismissed by a federal district court,[57] and eight private actions (four class actions and four individual cases) are pending in Ontario, Quebec and British Columbia. Two trials in small claims courts were unsuccessful. The government of Canada's smuggling action in the U.S. has been rejected by an appellate court, although further appeal remains possible.[58]

India

Two proceedings now before the Supreme Court of the Indian Union are among the most important developments in the history of global tobacco litigation and may point the way for litigation in other countries. Public interest litigation ("PIL") cases commenced by writ petitions, these proceedings take advantage of the right of citizens to petition the Supreme Court of India to enforce the fundamental rights guaranteed by the Constitution, or, if necessary, to compel the government to do so. Bypassing actions in law, these writ petitions allow faster, more affordable access to justice and

---

[56] Information about the British Colombia litigation, including the text of the provincial legislation, the government's Statement of Claim, and litigation-related documents, are online at http://www.moh.hnet.bc.ca/tobacco/litigation/index.html.

[57] *See* note 84 below.

[58] *See* note 84 below.

the fashioning of broad, innovative relief limited only by the creativity and will of judges.[59]

The almost unlimited potential power of these proceedings was demonstrated in November 2001, as the Supreme Court of India granted key elements of a sweeping public interest writ petition initiated by the President of the Mumbai Regional Congress Committee, Murli Deora, against both the Union of India and major Indian tobacco companies.[60] Grounded in the fundamental constitutional rights of every citizen to life, health and a clean environment, the *Deora* petition argued that the Union of India had abrogated its duty to safeguard the public health, especially "the health of children of tender age," and had failed to act to control tobacco use. The petition requested that the Ministry of Health and Family Welfare be directed to develop a comprehensive national tobacco control policy, including the elimination of public smoking, adoption of stronger health warnings on cigarettes, meaningful enforcement of advertising restrictions, control of sales to children, and creation of a fund to compensate victims of smoking, to be funded by tobacco companies.[61]

On November 2, 2001, at the suggestion of petitioner's counsel, and with the agreement of the Attorney General, the Supreme Court ordered the states of the Indian Union to issue immediate orders banning smoking in hospitals, educational institutions, railways and public transport, courts and public offices, libraries and auditoriums nationwide.[62] At one stroke, the Court accomplished measures that had long been proposed and that were, at the time, under consideration before the Indian Parliament.

At the same time, the Court took up a second key aspect of the petition. Counsel for the petitioner had contended that Indian advertising restrictions and health warning requirements were "hopelessly unsatisfactory" and were being "shamelessly flouted," not only by foreign periodicals that published advertisements without health warnings, but also by companies' use of brand stretching and sports sponsorships to evade

---

[59]Information drawn from Rani Jethmalani, "Country Report From India" and the Honorable K. Narayana Kurup, "Consumer Protection in India (Kerala Case)," presentations at the Amman Consultation; from news reports and from Roberta B. Walburn, "The Prospects for Globalizing Tobacco Litigation," paper presented at WHO International Conference on Global Tobacco Control, New Delhi, India, 7-9 January 2000, http://tobacco.who.int/repository/tld94/ROBERTA2000X.doc., at 31 – 33.

[60]Shri Murli S. Deora, et al. v. Union of India, et al.

[61]"SC Slaps Notices on Cigarette Majors For Non-Compliance With Statutory Warnings," *The Indian Express*, August 9, 2001, http://www.expressindia.com/fe/daily/19990810/fec10035.html.

[62]Dinesh C. Sharma, "Indian Court Orders Total Ban on Smoking in Public Places," 358 *The Lancet* 9293 (November 10, 2001).

warning requirements -- for example, by having cricket players wear company logos. In response, the Supreme Court's order directed Police Commissioners of major cities to report to the Court on actions they were taking to enforce the advertising code.

This historic case remains before the Supreme Court for continuing proceedings, where it may take up still more elements of the petitioner's broad requests. Already, however, it has set a new standard for the power of tobacco litigation to effect major social change quickly and without prohibitive expense.

A second sweeping petition, accepted by the Supreme Court in 2000, confirms this potential. In this proceeding, brought by Supreme Court Advocate Rani Jethmalani, a participant in the Amman Consultation, the Indian NGO Women's Action Research and Legal Aid for Women (WARLAW) has asked that the national government be directed to conduct the first criminal investigation of the Indian tobacco industry, focusing on the role of cigarette manufacturers in the smuggling of cigarettes into India, following newspaper investigative reports and revelations from tobacco industry documents.[63] Like the *Deora* proceeding, the *WARLAW* petition asserts that the government's inaction has undermined the constitutional rights of citizens to life and health. The petition also seeks creation of a compensation fund under the Ministry of Health and Family Welfare In August 2001, the Supreme Court Bench stated that the issues raised by the petition appeared to be valid, but expressed uncertainty about its ability to order creation of a compensation fund, and asked the Attorney General to report on the status of similar proposals pending in Parliament.[64] The petition remains before the Court. If ultimately successful in moving debate over smuggling and the tobacco industry's conduct, generally, into the arena of criminal law, this petition will further prove the enormous power of public interest litigation.

These cases are not unprecedented in India. The Supreme Court's order restricting public smoking paralleled an equally stunning decision only two years earlier in the High Court of the State of Kerala.[65] In that case, a public interest writ had argued that the constitutional right to life includes a right to be free of public smoking and smoking-related disease. The landmark decision of Justice K. Narayana Kurup agreed, ruling not only that "public smoking of tobacco in any form ... is illegal, unconstitutional and

---

[63]Rani Jethmalani, "Country Report From India," presentation at the Amman Consultation, and "PIL Filed Against Smuggling By Tobacco MNCs," *The Indian Express,* December 15, 2001, http://www.indian-express.com/ie/daily/20001216/ifr16051.html.

[64]"SC Asks Centre About Status of Anti-Tobacco Bill," *Times of India*, August 22, 2001.

[65]Ramakrishnan v. State of Kerala, AIR 1999 Ker. 38.

violative of Article 21 of the Constitution of India," but also that public smoking constitutes air pollution and a public nuisance. Demonstrating the broad authority of judges acting in equity, the Court, on its own motion, added dozens of public officials to the list of respondents originally named by the petitioner, to ensure thorough enforcement of the Court's order that the state promulgate a prohibition against public smoking. Following the dismissal of an appeal, the High Court issued a supplemental order tightening its ruling, and required police to file regular reports on their enforcement efforts. As a result, thousands of smokers were fined and, a year after the decision, public smoking in Kerala had been largely eliminated.

Other, equally sweeping, writ petitions are now pending before several other courts of India. These cases represent a powerful and attractive model worthy of close study not only in Member States with established traditions of public interest writ litigation, but by health officials and advocates worldwide.

Norway

In a groundbreaking employer's insurance liability case in October 2000, the Supreme Court of Norway upheld the award of $260,000 in compensation to a worker who developed lung cancer after working for fifteen years as a bartender in a smoky nightclub. The case, which would represent a milestone under any circumstances, is even more significant in light of the fact that the worker had herself smoked cigarettes for more than twenty-five years, a consideration which was held to reduce, but not prevent, her recovery. Together with the landmark Australian case handed down in May 2001, this decision marks a global milestone in the recognition of liability for the harm caused by second-hand smoke.

Norway's first personal injury action against a tobacco manufacturer was tried in the Orkdal District Court in November 2000. The District Court ruled that smoker Robert Lund's lung cancer had been caused by the "roll your own" cigarettes he had smoked since 1953, and that the conditions for no-fault product liability were met, but that Lund's failure to quit smoking after the hazards became more widely known prevented him from recovering compensation from the dominant Norwegian manufacturer, Tiedemanns Tobakksfabrik. Lund died shortly after trial, and his widow has appealed the decision. A third individual injury case in set for trial in early 2002, and four or five others are pending in the Norwegian legal system.

Perhaps most importantly, the Norwegian Ministry of Health and Social Affairs has supported a thoughtful and comprehensive review of the potential tort liability of the tobacco industry under Norwegian law. In a 700-page report submitted in June 2000,

an expert committee convened at the request of the Ministry concluded that Norwegian counties and cities would have significant likelihood of winning health care cost recovery cases against the tobacco industry under Norwegian law, although no such cases have yet been filed.[66]

Saudi Arabia

One of the most significant developments in the globalization of tobacco litigation occurred in December 2001, when the leading cancer hospital in the Kingdom of Saudi Arabia, the King Faisal Specialist Hospital (KFSH) filed suit in the Grand Shariah Court of Riyadh against ten international tobacco manufacturers and their local agents. The suit seeks $2.9 billion for the cost of treating an estimated three million sick smokers over a period of twenty-five years.[67] Earlier in 2001, the hospital had filed a similar suit in the United States, and had expressed an intention to bring a third suit in Switzerland, as well as a possible action against manufacturers of tobacco products smoked in shishas, or water pipes.[68]

The case filed in Riyadh, in particular, is unprecedented. It represents the first action to bring an account of the deceptive practices of international tobacco manufacturers, in general, and health care cost recovery theories, in particular, before an Islamic court. Because *shariah* courts are guided by principles of Islamic law, their treatment of these cases may differ in significant ways from the approaches of courts based in other legal traditions. These governing principles allow Islamic courts an unusual degree of flexibility, and draw directly upon Islam teachings, including, quite possibly, the views of leading scholars that smoking is *haram*, or to be discouraged, as a vice that degrades the body and offends human dignity. By introducing international tobacco litigation to Islamic courts, the new Saudi action may open vast new possibilities for the globalization of litigation, not only for recovery of medical costs, but, just as

---

[66] Information on litigation in Norway is drawn from news reports and from Asbjorn Kjonstad, *et al.*, *Tort Liability for the Norwegian Tobacco Industry, Executive Summary of Norwegian Official Report 2000:16, A Science-Based Report to the Minister of Health in June 2000* (2001), http://www.tobakk.no/english/.

[67] Information on the Saudi Arabian litigation is drawn from a presentation at the Amman Consultation by the chief architect of the litigation, Ahmad Othman Al Tuwaijri, on "Opportunities and Obstacles for Litigation in Saudi Arabia," and from news reports, including "A Saudi Hospital Sues Over Tobacco," *New York Times*, December 4, 2001; "KFSH Moves Court Against Tobacco Firms," *Arab News*, December 4, 2001; and "Leading Saudi Hospital Files Anti-Tobacco Suit," *China Daily*, December 4, 2001.

[68] "Saudi Hospital Sues Tobacco Firms," *BBC News*, February 5, 2001.

importantly, for elimination of advertising, control of the sale of tobacco to youth and restriction of smoking in public places.

Sri Lanka

Civil legal actions for damages and compensation in Sri Lanka are governed by principles of Roman Dutch law, which differ significantly from English and American law, and which may give rise to unique obstacles to recovery in litigation. Nevertheless, Sri Lanka has recently seen the filing of its first individual tobacco case, brought by a fifty-five-year-old tailor who alleges that his lung cancer was caused by cigarettes manufactured by Sri Lankan manufacturer Ceylon Tobacco Company. The plaintiff alleges that he became addicted to the cigarettes at the age of fifteen and that the manufacturer negligently and fraudulently concealed the fact that its products are addictive and cause cancer and other diseases. The defendant has denied the allegations, alleging that it has affirmatively informed the public about the harmful effects of its products. The case awaits trial.[69]

Uganda

As in Bangladesh and India, advocates in Uganda are making creative use of public interest writ litigation to seek dramatic advances in tobacco control without incurring the large financial commitments involved in health care cost recovery litigation. The Ugandan proceeding, filed in 2000 by The Environmental Action Network (TEAN), a non-governmental environmental organization, seeks to force the adoption of nationwide restrictions on public smoking.[70] Like the writ litigation in India and Bangladesh, it petitions the courts to protect rights guaranteed by the national constitution (in this case, the rights to life and to a clean and healthy environment guaranteed by Articles 21 and 39 of the Constitution of Uganda) and alleges that the absence of restrictions on smoking in public places violates these rights. Like the Indian litigation, the Ugandan petition is directed, not against tobacco companies, but against senior public officials responsible for protecting the constitutional rights involved. After initial rulings upholding the standing of the applicant organization and rejecting the

---

[69]Information concerning litigation in Sri Lanka drawn from Yasantha Kodagoda, "Opportunities and Obstacles for Anti-Tobacco Litigation in Sri Lanka," paper presented at the Amman Consultation.

[70]The Environmental Action Network, Ltd. v. Attorney General and National Environment Management Authority, Misc. Application No. 39 of 2001, High Court of Uganda. Information about the Ugandan litigation is from Kampala attorney and advocate Phillip Karugaba.

standing of manufacturer BAT to intervene, the case entered negotiations toward a possible settlement with the potential to introduce important new restrictions on smoking in a wide range of public settings. Those negotiations are currently pending. Regardless of the outcome, the case demonstrates that, under the right circumstances, litigation can be used effectively in low-income countries and need not be prohibitively expensive.

IV. STARTING POINT: THE DOCUMENTS

The starting point for analysis, for any consideration of possible public inquiries or litigation, is the information contained in the thirty-five million pages of tobacco industry documents uncovered as a result of litigation in the U.S. state of Minnesota and elsewhere.[71] As the participants in the Amman Consultation strongly agreed, these documents, and the powerful revelations they continue to yield, are the key link between the medical issues and legal theories, and are the most important tool for re-framing the debate in a member state considering legal options.

The power of these industry documents flows only partly from the definitive proof they provide that the industry knew, long ago, that its products are addictive and cause many diseases; that these companies target children, and that manufacturers manipulate the chemistry of cigarettes. Just as important is the vivid way in which the documents expose the deceit that permeates all the industry's statements and actions of the last fifty years. By exposing, in tobacco executives' own words, the dishonest and starkly cynical nature of their statements and actions, the documents deprive the industry of credibility, undercut its current arguments and focus the debate on its own behavior.

Further, the documents have the power to localize the debate. Beyond the information they reveal about health issues and the industry's long-running global conspiracy, the documents also contain a surprising amount of information about direct industry manipulation of public health efforts in particular Member States and regions, and about the industry's use of front groups, "independent" consultants and secret political allies. To take just one example, a stunning fifteen-page memorandum discovered in the Minnesota documents reveals the comprehensive strategy used successfully by the tobacco industry in 1993 to defeat a ban on tobacco advertising proposed by Dr. Sherif Omar, a leading member of the Egyptian Parliament.[72] Strikingly, this plan was developed by the regional offices of multi-national Philip Morris Corporation, even

---

[71] *See generally* Roberta B. Walburn, "The Role of the Once Confidential Industry Documents," 25 *William Mitchell Law Review* 431 (1999) and Michael V. Ciresi, Roberta B. Walburn and Tara D. Sutton, "Decades of Deceit: Document Discovery in the Minnesota Tobacco Litigation," 25 *William Mitchell Law Review* 477 (1999).

[72] Philip Morris, Corporate Affairs, Middle East & North Africa, Dubai, UAE, "The Threat of a Total Ban on Advertising in Egypt, Strategy Guidelines and Action Plan," August 15, 1993, Bates Nos. 2501066298-6320, available online at http://www.pmdocs.com. Sherif Omar, "Country Report from Egypt," and Hamdi El-Sayed, "Experience of Egyptian Parliament With Tobacco Control," papers presented at the Amman Consultation.

though Philip Morris's share of the Egyptian cigarette market was minimal. The plan called not only for legislative maneuvering and mobilization of public opposition to the legislation, but also for the secret use of allies and intermediaries, and suggests that these secret surrogates included prominent political figures in Egypt and neighboring countries. By making such secret alliances transparent, the documents can energize public concern and tip the local balance of political power. Often, these local connections do more to make the information real, and to advance tobacco control, than do any of the revelations that are already well known.

For these reasons, participants in the Amman Consultation stressed the need to force the release of additional documents around the world, improve access to the documents that are already public, and increase capacity for document research and analysis and dissemination.

Some thirty-five million pages of tobacco industry documents are now public, most of them released as a result of the tobacco litigation brought by the State of Minnesota in the United States. These documents come from the files of those manufacturers who sell most of the cigarettes sold in the United States: Philip Morris; BAT Group and its U.S. subsidiary, Brown & Williamson; Lorillard and Liggett & Myers. Because these documents were produced in the course of the Minnesota case, they include only a fraction (and an unpredictable fraction) of the documents in those companies' files worldwide. For example, the documents do not include all company files with regard to second-hand smoke, or the complete files of the companies' subsidiary corporations around the world, because those files were not at issue in the Minnesota case. Moreover, they do not include the documents of other large tobacco companies that were not parties in the Minnesota case, such as Japan Tobacco, Reemstma, Seita (now Altadis), Rothmans (now combined with BAT) or China Tobacco, except to the extent that occasional copies of documents from these companies may have been included in the files of the Minnesota defendants. Finally, although the public collections do include thousands of documents the companies attempted to withhold as confidential attorney-client communications, many thousands of other such documents (including, for example, thousands of "privileged" documents related to marketing to youth) were not disclosed and remain in the industry's sealed vaults today. The Minnesota documents, therefore, are but a down payment on what might be learned if all tobacco industry files, worldwide, could be opened.

Despite these limitations, the Minnesota documents have proven to be a treasure trove of information. While their contents are unpredictable, they continue, with surprising frequency, to offer up powerful new information such as that contained in the Egyptian document cited above. It is this that makes them the starting point for decisions about legal options. The Minnesota documents are available in several locations and formats.

Paper copies of documents of the companies based in the U.S., as well as a limited set of BAT documents, can be reviewed at a document depository in Minnesota.[73] Paper copies of the documents of BAT can be accessed at a depository in Guildford, United Kingdom.[74] More conveniently, most of the documents in the Minnesota depository can also be accessed online.[75] Documents in the Guildford Depository are not available online.

Recognizing the importance of the documents and their contents, participants in the Amman Consultation identified the most important barriers to increased use of this resource, and agreed on the urgent need for:

- Concentrated efforts to win release of additional documents from tobacco manufacturers and industry associations outside the United States.
- Improved access to documents in the Guildford Depository, preferably in electronic form.
- Creation of a centralized mechanism to assist Member States in:
  - Gaining physical access to, and translating, documents.
  - Identifying and analyzing relevant documents.
  - Preparing regional or country reports.
  - Increasing global capacity for document research and analysis.
  - Disseminating the findings of document research.

---

[73] Minnesota Tobacco Document Depository, 1021 10th Avenue, S.E., Hennepin Business Center, Minneapolis, Minnesota 55414, USA. Telephone 01-612-378-5707.

[74] Access to the Guildford depository is by appointment, which can be arranged through Martyn Gilbey, British American Tobacco, Globe House, 4 Temple Place, London, WC2R 2PG. Telephone 44 171 845 1466.

[75]A massive, public electronic library, which will eventually contain copies of all the Minnesota documents and other tobacco industry documents, is under development at the University of California, San Francisco. That library can be accessed at http://legacy.library.ucsf.edu/., but is not expected to have the entire collection of documents available in electronic format for some time. Until this facility is fully accessible, Web sites maintained by the U.S. manufacturers can be accessed at http://www.tobaccoarchives.com, alth these sites present a number of difficulties for users. BAT documents are generally not available online. Another valuable resource for retrieving documents, maintained by a private health advocate, can be found at http://www.tobaccodocuments.org. General information on searching the tobacco documents can be found in "Searching Tobacco Industry Documents: Basic Information, Steps and Hints," a Fact Sheet prepared for the 11th World Conference on Tobacco OR Health, http://www.tobaccofreekids.org/campaign/global/docs/searching.pdf. *See also* Mark Gottlieb, "Overview of US Tobacco Litigation and Tobacco Industry Documents," paper presented at the Amman Consultation, and Mar k Gottlieb, "Finding the Documents," available at http://www.tobacco.neu.edu/WHO/index.html.

V. PUBLIC INQUIRIES AS A MANAGEABLE ALTERNATIVE

In light of the complex challenges involved in litigation, considerable discussion at the Amman Consultation also focused on the strengths and weaknesses of public inquiries as a possible prelude or alternative to litigation. Participants concluded that, for many Member States, public inquiries of various types may be attractive options. Public inquiries may take many forms, but they share a number of qualities that distinguish them from litigation and that may commend them as an approach in states where the legal system makes litigation success doubtful, or where the resources or political support for litigation are absent. Foremost is the fact that public inquiries can, in the apt phrase of one of the Amman participants, "act as truth machines."[76]

Further, a successful public inquiry may create the foundation of new evidence and public support that allows more serious consideration of litigation options. Significantly, the successful third wave litigation in the United States was sparked in large part by a 1994 Food and Drug Administration investigation of tobacco industry motivations in marketing cigarettes and controlling nicotine levels, and by simultaneous Congressional hearings. These investigations galvanized public opinion, clarified industry positions and uncovered damning information in the form of both documents and testimony — all of which laid groundwork for subsequent cases.

Participants in the Amman Consultation reviewed other examples of successful public inquiries. Most notably, an inquiry by the Health Select Committee of the House of Commons of the United Kingdom offered a model for successful parliamentary inquiries.[77] The U. K. inquiry, concluded in 2000, examined evidence of involvement by British American Tobacco Company in international cigarette smuggling. Through its investigation, the Select Committee focused increased public attention on smuggling — forcing tobacco executives to state their positions publicly and juxtaposing them against the contradictory evidence of internal documents. The inquiry demonstrated one of the most important roles of inquiries as the Select Committee used its subpoena power to compel the production of important new documents from the files of BAT's advertising agencies, revealing new evidence of industry advertising activities in the United Kingdom. The public visibility of the parliamentary proceeding effectively precluded the industry from fully exploiting the tactics of delay, denial, obfuscation and obstructionism the typify its litigation defenses. The Select Committee's proceedings,

---

[76] Clive Bates, "UK Parliamentary Inquiry; Smuggling and BAT," presentation at the Amman Consultation.

[77] Clive Bates, "UK Parliamentary Inquiry; Smuggling and BAT," presentation at the Amman Consultation.

and its subsequent report,[78] helped generate support for a new regulatory agenda and developed information valuable for subsequent public advocacy, smuggling litigation and global debate on the proposed Framework Convention on Tobacco Control. Comparable proceedings may be attractive options in many countries, whether conducted by parliamentary or legislative committees, or by independent commissions of inquiry with the power to summon and examine witnesses, such as those authorized by Kenya's Commissions of Inquiry Act.[79]

Public inquiries need not involve parliamentary proceedings or public hearings to have tremendous impact. The 2000 report of the Committee of Experts appointed by the Director General of WHO to examine evidence of tobacco industry interference with the health initiatives of WHO[80] offers a striking example of the potential influence of an inquiry designed to assemble and analyze existing evidence, through the preparation and dissemination of a report and recommendations. The shocking findings of the Committee's report, and the influence of its recommendation for reform, are well known, and were described to participants at the Amman Consultation by Dr. Anke Martiny, a member of the Committee of Experts.[81]

Another form of inquiry is illustrated by a regional investigative report prepared by the Eastern Mediterranean Regional Office of WHO and released to great public interest at the Amman Consultation, *Voice of Truth, Volume 1: Multinational Tobacco Industry Activity in the Middle East: A Review of Internal Industry Documents* (2001).[82] Drawing on 500 industry documents, this report recounted surreptitious tobacco industry campaigns to undermine advertising bans and other public health programs in the Eastern Mediterranean Region, and especially in the Gulf Cooperating Council, as

---

[78]U.K. House of Commons, Health Select Committee, Second Report, Session 1999 – 2000, *The Tobacco Industry and the Health Risks of Smoking*, 14 June 2000, http://www.parliament.the-stationery-office.co.uk/pa/cm199900/cmselect/cmhealth/27/2702.htm.

[79]Charles K. Maringo, "Country Report On Opportunities for a Public Inquiry — Kenya," presentation at the Amman Consultation.

[80] World Health Organization, *Report of the Committee of Experts on Tobacco Industry Documents: Tobacco Company Strategies to Undermine Tobacco Control Activities at the World Health Organization* (2000), http://tobacco.who.int/repository/stp58/who_inquiry.pdf.

[81]Anke Martiny, "Inquiry on the Tobacco Companies' Strategies to Undermine Tobacco Control Activities at WHO," paper presented at Amman Consultation.

[82]Celia White, "Multinational Tobacco Industry Activity in the Middle East: A Review of Internal Industry Documents," presentation at the Amman Consultation.

well as WHO's work in the region. Included in the report were tobacco company documents claiming to have enlisted the secret assistance of prominent political figures in the region; as well as evidence of industry plans to "carefully target our opponents" and "precisely identify, monitor, isolate and contest key individuals and organizations." This report, the first of a projected series of regional and national studies, illustrates that a successful public inquiry can take the form of a scholarly review and analysis of the documentary evidence.

Whatever their form, public inquiries involve both risks and benefits. The most important risk is the danger that the inquiry may fail to uncover the full extent of industry activity, and that the public will be left with a false impression the industry has been exonerated. This makes it critical that any official inquiry be carefully designed and conducted, so that tobacco control efforts are not set back. More specifically, any public inquiry should:

- Be adequately staffed and funded, and have sufficient time, to conduct a thorough and careful inquiry.

- Have access to a meaningful collection of industry documents from the region involved, and from the files of the major tobacco companies active in the region.

- Have the power to compel production of additional documents to follow through on leads identified in existing documents.

- Be conducted by officials with the independence and political will to follow the inquiry to conclusion, even if subjected to political pressure and even if prominent figures are implicated in wrongdoing.

Notwithstanding these concerns, public inquiries offer many advantages. Among the most important:

- Inquiries do not require the resources and financial commitment involved in large-scale litigation. They can be targeted to specific issues and limited in duration. For low-income countries, in particular, they may be an affordable alternative to litigation.

- Inquiries raise the profile of tobacco issues and increase public awareness, helping to set policy agendas.

- Formal inquiries may offer the best opportunities for compelling the release of additional industry documents.

- Those conducting legislative inquiries are typically given legal immunity from possible industry threats of litigation.

- Inquiries help place tobacco company positions "on the record" for public review, exposing their absurdity — as happened with the testimony of U.S. executives in 1994.

- Where health ministries and legislative bodies are controlled by different political parties, an inquiry by legislators can serve to force health officials to act more decisively on tobacco issues, or vice versa.

- Perhaps most importantly, public inquiries can generate and analyze key evidence of tobacco industry conduct in the country, providing the groundwork for a meaningful analysis of litigation options in the country.

While any inquiry must be planned and executed with care, these benefits commend public inquiries as a possible approach, either as an alternative to litigation or as a first step toward the consideration of litigation options.

VI. CHOICES AND DECISIONS: A LITIGATION TOPOGRAPHY

Because litigation can take so many different forms, it is impossible to evaluate the risks and benefits of acting without first identifying the type of litigation being contemplated. One way to begin this process is with the questions traditionally asked by journalists: "Who, where, what, why and how?"

Who will bring the case? Against whom? Where? Why are they liable? What relief will be requested? How will the litigation be financed? Different answers to these questions offer different advantages and disadvantages. Together, these choices will determine the prospects for success within a given legal system. The options available are suggested by a brief survey of the topography of the litigation landscape.

Who Will Bring the Action?

- **Individual plaintiffs or petitioners** may be appropriate for writ litigation seeking injunctive relief, but individual smokers may have insufficient claims for compensatory damages to justify the expenditures necessary for thorough litigation of a damage action. At the same time, individual actions involve only limited risks: an individual case that fails for insufficient proof of causation or damages will not prevent others from bringing later cases; even an adverse legal ruling may not be binding on others.

- **Aggregated individual actions**, through class actions, representative proceedings or similar consolidated litigation, allow for large recoveries that justify the expense necessary for well-developed case presentation. Aggregation adds complexities that increase risks and opportunities for delay and may compromise the interests of individual class members. Further, the risks involved are great; adverse decisions in a class action may preclude future claims.

- **Governments**, at the national or sub-national level, may have greater resources for litigation, but may also be influenced by shifting political winds, which may jeopardize the continuity of support for the litigation.

- **Private entities**, such as health insurance companies or private hospitals, may have substantial claims, but courts may be reluctant to recognize their standing, or right to assert an interest in the litigation.

- **NGOs** may be appropriate petitioners in writ litigation, but may have limited resources and may face issues of standing in some actions.

Who Will Be Named As Defendants?

- **Tobacco companies** are the logical principal defendants. The specific companies to be named will, of course, vary from one market to another. Actions against multinational manufacturers will require decisions whether to name only local operating companies or to pursue additional extended litigation to attempt to establish direct responsibility of parent companies.

- **State-owned tobacco companies** present special challenges. Governments and their public health programs may be unable or unwilling to take legal action against state-owned companies, and actions against them by private parties may be opposed by governments or poorly received by the courts. On the other hand, constitutional obligations of governments to protect the health of citizens may offer an additional basis for legal claims against state-owned enterprises.

- **Tobacco sellers**, including distributors and retailers, especially those who sell tobacco products illegally to minors, may be appropriate defendants, but the large number of retail sellers presents individualized issues of proof and damage calculation.

- **Governments** may be named as defendants, either for their control of state-owned tobacco companies or for their failure to fulfill affirmative obligations to protect citizens or public health under the national constitution or international obligations. Actions against governments may raise additional issues of sovereign immunity, but governments may be less likely to engage in the litigation tactics typical of tobacco manufacturers. On the other hand, courts in some countries may be unlikely to rule against the national government.

- **Employers and business owners** are potential defendants in actions by employees or customers injured by exposure to second-hand smoke. Employee claims against employers may be limited to recovery under applicable workers' compensation or employer liability insurance programs. Claims by customers may involve difficult proof of causation.

Where Will the Case Be Brought?

- **In the courts of the nation where the tobacco is consumed.** The obvious location for litigation is in the state where the tobacco is consumed and its users reside. Judges and juries here will be most familiar with local conditions; officials, victims and many witnesses will be located here. Local legal rules and procedures may not be conducive to success, however. Large monetary awards, and, indeed, the use of litigation as a tool for social and health-related issues, may not be well accepted. Tobacco manufacturers, tobacco documents, and some of the necessary expert witnesses may be located far away.

- **In the courts of the United States.** A number of Member States have initiated tobacco litigation in the courts of the United States, as the home country of several manufacturers and the site of key activities in the course of the global tobacco industry's long-running conspiracy of deceit.[83] These cases have not fared well.[84] Many of these cases have been prepared by U.S. attorneys representing governments under contingent fee arrangements, hoping to replicate the large monetary recoveries of a few successful cases in prior U.S. litigation. The choice of U.S. courts permits the use of contingent fee arrangements, avoids the "loser pays" principle and provides access to liberal rules of pre-trial discovery. Jurors in the U.S. are

---

[83]Health care cost recovery cases have been filed by Belize, Bolivia, Guatemala, Honduras, Nicaragua, Panama, Russia, Tajikistan, Ukraine and Venezuela, as well as a number of Argentine unions, several Brazilian states and the Canadian Province of Ontario. In late 2001, the European Union, joined by Belgium, Finland, France, Germany, Greece, Italy, Luxemburg, the Netherlands, Portugal and Spain, refiled a case asserting claims under the U.S. RICO statute for remedies in connection with alleged global smuggling activities, after an earlier filing was dismissed on technical grounds. Canada, Colombia and Ecuador have also filed smuggling-related cases. A number of these cases have been dismissed. *See* note 84 below.

[84]A recent decision of the U.S. Circuit Court of Appeals for the D.C. Circuit, dismissing the cases of Guatemala, Nicaragua and Ukraine, does not bode well for pending health care cost recovery cases by national governments. Service Employees International Health and Welfare Fund, et al. v. Philip Morris, Inc., 249 F. 3d 1068 (D.C. Cir. 2001). The Supreme Court has declined to review this decision. The cost recovery cases brought by Argentine unions were also dismissed in 2001 by the Superior Court of the District of Colombia. The Ontario cost recovery action was dismissed by the federal district court, and is on appeal. Similarly, Canada's smuggling suit was rejected by the U.S. Court of Appeals for the Second Circuit in late 2001, after the Canadian government had spent a reported $10 million on the case. *See also* Republic of Bolivia v. Philip Morris, Inc. , 1999 WL 1123000 (S.D. Tex. 1999), rejecting, in colorful terms, Bolivia's selection of Texas as a forum for its cost recovery action.

familiar with large monetary awards and have been exposed to public debate and education about the actions of the tobacco industry.

Despite these possible benefits, litigation in the U.S. also holds a number of potential disadvantages. First, this approach reduces the value of litigation as a public health tool. A case filed far from the country involved will be far less visible, and will have far less power to educate the people of the plaintiff country and build public support for tobacco control. Second, if a case is filed in the U.S., most participants, from U.S. attorneys representing the plaintiff country to the judge and jurors, are unlikely to be familiar with conditions in the country involved. For example, a U.S. judge is unlikely to be well qualified to fashion injunctive relief best suited to local needs of another country. Third, witnesses and victims will be located far from the court. Fourth, and perhaps most importantly, litigating at such a distance is likely to weaken the control that officials of the country can exercise over their litigation, and to place extraordinary influence, if not control, in the hands of their private attorneys in the U.S. Finally, courts in the U.S. may be unreceptive, or even hostile, to such claims, if the nexus between the injuries alleged and the United States is not apparent. For example, of the major multinational tobacco manufacturers, only Philip Morris Corporation is based in the United States,[85] and U.S. courts may question the choice of the U.S. as a litigation forum by a country whose citizens smoke mainly cigarettes made by companies located elsewhere. This raises a risk that U.S. courts may reject a country's claims in ways that prejudice the country's ability to pursue them elsewhere.

What Legal Theories Will Be Asserted?

What will be the legal basis for the case? What theories, claims and causes of action will be asserted? Answering these questions is perhaps the most difficult challenge in framing tobacco litigation. Success requires more than familiarity with local law. It requires absolute discipline and a strategic approach beyond that of ordinary litigation, combining clear-eyed assessment of the legal merits of possible claims with the imagination to anticipate every possible industry response. The strength of different causes of action will depend on the legal setting in which they are brought. Theories that may have succeeded in the United States or elsewhere cannot be exported blindly. Instead, advocates should consider the types of litigation that have been most

---

[85] R.J. Reynolds Corporation, which formerly sold cigarettes internationally, in 1999 sold the international rights to its brands to Japan Tobacco, Inc., based in Japan and controlled by the government of Japan.

successful in their jurisdiction previously, and should fashion a case for its compatibility with local legal traditions.

At the same time, successful tobacco litigation is not about repeating what has been done before. The great breakthroughs in fifty years of litigation have been achieved by advocates who thought the unthinkable. From the first jury verdict for a victim of second-hand smoke in Australia, to the conception of the first governmental actions in the U.S., to the formulation of the first tobacco-related writ litigation in India, the historic achievements have come from those who framed the problem in new ways, opening new legal paths.

The most promising cases, therefore, are those that have not yet been imagined. Perhaps they will build upon the dramatic achievements of public interest litigation in India. Perhaps they will emerge as tobacco litigation is adapted for the first time to courts grounded in an Islamic tradition. Perhaps they will be framed in terms of international human rights and the rights of the child. Or perhaps they will arise when tobacco executives' conduct is finally examined through the lens of criminal law.

Potential areas to consider, under the applicable legal standards and precedents of the jurisdiction, include:

- **Claims in tort**, or private civil wrongs, including:
  - Negligence, such as failure to warn or negligent product design.
  - Misrepresentation or fraud.
  - Product liability or no fault liability.
  - Undertaking a special duty.
  - Conspiracy, where this is recognized as an independent action.
  - Nuisance.
- **Contract claims** including express and implied warranties.
- **Claims in equity**, including restitution and unjust enrichment.
- **Statutory claims**, as determined by the laws of the jurisdiction. These might include claims grounded in:
  - Consumer protection laws and laws against deceptive advertising.
  - Competition (antitrust) laws and laws prohibiting the restraint of trade.
  - Smuggling laws.

- Laws against business conspiracies or laws analogous to the Racketeer Influenced Corrupt Organizations (RICO) law of the United States.
- Laws prohibiting tobacco advertising or the sale of tobacco to youth.
- Laws against public smoking or pollution of the air.

- **Constitutional claims** grounded in governmental obligations to protect citizens' right to life, health, safety or a clean environment.

- **Criminal liability** under general laws prohibiting the reckless or intentional endangerment of human life, laws prohibiting perjury or the giving of false statements under oath, smuggling laws, or laws prohibiting the adulteration or contamination of products intended for human consumption.

- **Liability under international obligations**[86] such as the Charter of the United Nations, the Universal Declaration of Human Rights, the Constitution of WHO, the United Nations Convention on the Rights of the Child,[87] or, in the future, the Framework Convention on Tobacco Control.

What Relief Will Be Sought?

The types of relief theoretically available in tobacco litigation are limited only by the courage and creativity of judges. What is most appropriate will depend on the traditions within the relevant legal system, the strength of the evidence supporting the case and the nexus between the causes of action alleged and the relief requested. The formulation of requests for relief requires strategic thinking. For example, a large monetary request, if seen by a jury as overreaching or out of proportion to the evidence, may undercut jury support for the plaintiff's case on liability, and a large monetary award, if characterized as punitive damages, may result in lengthy appeals and may ultimately be reduced or set aside. Similarly, some judges may be reluctant to award sweeping injunctive relief that, in effect, sets public policy.

---

[86]For a discussion of international legal commitments relevant to the Framework Convention on Tobacco Control, *see* William Onzivu, "International Legal and Policy Framework for WHO Framework Convention on Tobacco Control," paper presented at WHO International Conference on Global Tobacco Control Law: Towards a WHO Framework Convention on Tobacco Control, New Delhi, India, 7-9 January 2000, http://tobacco.who.int/repository/tld94/ONZIVU2000X.doc.

[87]On the relevance of the Convention on the Rights of the Child, *see* WHO, *Tobacco & the Rights of the Child* (2001) (WHO/NMH/TFI/01.3 Rev 1).

Notwithstanding the attention that has been paid to the monetary recoveries in some cases, the most important types of relief for advancing tobacco control and public health are non-monetary. A realistic understanding of tobacco litigation over the last fifty years, and an appreciation for tobacco use as a global health problem, both suggest that decisions about tobacco litigation and the relief to be sought should be premised not on the expectation of large financial recoveries, but on the goal of advancing public health in a meaningful fashion. The major forms of relief available include:

- **Release of industry documents.** Tobacco litigation's single greatest contribution to global tobacco control has been the release of long-secret industry documents. Yet the documents available today come from the files of only a few companies. Evidence of the conduct of the other large international tobacco companies, and of the hundred global subsidiaries of Philip Morris and BAT, remains to be discovered, as do the documents of trade associations and other affiliates around the world. Getting these documents, and sharing them with the health community of the world, should be the top priority of tobacco litigators.

- **Declaratory relief.** A formal judicial determination that defendants are liable, or have engaged in unlawful conduct, can be a direct catalyst for policy change, can provide a legal basis for individual victims' cases to proceed, and may make individual litigation economically viable.

- **Injunctive relief,** requiring defendants to take certain actions, or prohibiting them from taking others, offers room for creative remedies. Injunctive relief could include:
  - General prohibitions against future misconduct.
  - Restrictions on packaging, advertising, marketing, sponsorships or selling practices.
  - Changes in the design or formulation of cigarettes or other tobacco products.
  - Public disclosures, warning labels or statements, including corrective public educational campaigns.
  - Termination of industry programs or the disbanding of business associations.
  - Restrictions on public smoking.
  - Creation of smoking cessation programs.

- Orders requiring governments to develop and enforce tobacco control programs.

- **Equitable relief** could include other innovative remedies fashioned by the court to restore justice and remedy the harm caused by defendants. This could be financial, as in the case of restitution or the disgorgement of improper profits; could involve the invalidation or reformation of tobacco companies' contracts; or could require the industry to provide medical monitoring or testing.

- **Monetary remedies** serve multiple purposes. They may include compensatory damages; punitive (exemplary) damages; fines or civil penalties; statutorily-authorized attorneys' fees and money paid as equitable relief. As compensatory damages, monetary recoveries restore the financial losses of individual victims or reimburse governments or others for the costs of medical care. If large enough, they can punish defendants for their actions, creating incentives for improved behavior and deterrence against continued wrongdoing. Again, if large enough, they can force increases in the price of tobacco products, which will reduce the rate at which youth become smokers, encourage smokers to quit and reduce the consumption of those who continue to smoke. Depending on the constitutional and legal framework of the jurisdiction, there may be opportunities to direct substantial financial recoveries toward continued tobacco control efforts.

How Will the Litigation Be Financed?

Although innovative approaches, such as the recent successes in India, may suggest ways to reduce expenses, most large tobacco litigation is likely to be costly. Tobacco companies have perfected the art of increasing the cost of litigation, and they show no signs of changing this approach. It will never be possible to match the resources these companies spend defending litigation,[88] but it would be dangerous to launch large-scale litigation without access to substantial resources. This makes it essential that any consideration of litigation as a public health tool include a plan for financing the effort.

---

[88]The tobacco industry's willingness to expend almost unlimited sums in litigation is illustrated by its spending in the case brought by the State of Minnesota in the U.S. The tobacco companies employed thirty different law firms in the case. Defendant Philip Morris informed the court at one point that 1,000 professionals were working on its defense of the case, and that it was spending $1 million per week on the defense. The litigation lasted approximately 200 weeks.

Most large litigation to date has been brought under a contingent fee system, an approach with strengths and weaknesses. Contingent fees provide incentives for private attorneys, with access to private funding, to accept the cases and fund case preparation in exchange for a percentage of any eventual monetary recovery. Contingent fees can create access to justice for people, organizations and governments with valid legal claims who would otherwise be excluded from justice by the cost of legal proceedings. But contingent fee arrangements, with their reliance on resources provided by private attorneys, may give the private attorneys — whose agendas sometimes differ from those of health officials — disproportionate control over the litigation and skew litigation priorities toward monetary recoveries rather than health concerns.[89] This makes it critical that any state considering this approach exercise great care in selecting attorneys with a demonstrated commitment to public health and a proven record of litigating cases to successful verdicts.

Legal and procedural rules in many countries preclude the use of contingent fees. In many jurisdictions, the absence of contingent fees, combined with the "loser pays" rule and restrictions on aggregated claims, may be a decisive barrier to private litigation. Such restrictions have already resulted in the abandonment of promising litigation by skilled legal counsel in Australia and the United Kingdom, and may have similar effects in other countries. Where these restrictions exist, large-scale litigation may require a substantial advance commitment of public funds.

---

[89]The handling of the tobacco litigation brought by U.S. states offers a cautionary lesson. Many states were represented by varying groups of wealthy private attorneys acting on contingent fee agreements. Among these attorneys were some whose handling of prior cases was controversial for allegedly putting concern for the attorneys' own fees ahead of the interests of their clients. Typical of these allegations was the story that one of these attorneys, said to laughingly refer to himself as "a known sleazebag," had allegedly tried to profit from the disastrous 1984 release of toxic gases at Union Carbide Corporation's Bhopal, India, chemical plant, by claiming to have been hired by 30,000 Bhopal residents and then agreeing to accept Union Carbide's first settlement offer. Peter Pringle, *Cornered: Big Tobacco at the Bar of Justice* (New York, Henry Holt and Company 1998) at 45-48. Others took pride in never actually trying cases; instead, they accepted settlements (and fees) on such terms as they could negotiate with defendants. In the opinion of many observers, the involvement of these attorneys became one factor encouraging states to settle quickly and to focus disproportionately on the monetary recoveries that would determine the attorneys' fees.

VII. LITIGATION: LESSONS LEARNED

The potential value of successful litigation is inescapable.[90] As successful cases have demonstrated, it can pull back the veil on tobacco industry deception, shape opinion and focus debate on the true "vector" of the tobacco epidemic, the tobacco companies and their executives. By exposing tobacco companies' subversion of public health initiatives and their hidden alliances, it can help restore the integrity of policymaking. Used effectively, litigation can force changes in the conduct of the tobacco companies or force governments to act. In some cases, it may even generate revenues to compensate victims or support tobacco control activities.

Given this potential, many Member States are keen to understand this powerful new instrument. That desire was evident at the Amman Consultation, as participants struggled to identify the lessons of litigation for many different legal and cultural traditions. While the process of globalizing litigation will require time and careful study, some fundamental lessons are already apparent.

It was the almost incomprehensible size of the massive financial awards in a few of the U.S. cases, more than any other single factor, that first captured the world's attention. Often, reports of billion dollar settlements had a mesmerizing effect, impairing sober understanding of the true risk and expense of the litigation. In some cases, private attorneys, hoping to enlist national governments as clients, may have encouraged a "gold fever" mentality that obscured realistic understanding of the difficulties involved.

Litigation is no panacea. Nor is it for everyone. In many countries, litigation may be inappropriate or doomed to failure. In others, it may need to take forms very different from the cases of the past. The monumental scale, expense and endlessness of U.S.-style health care cost recovery cases and class actions defy the imagination; they must be experienced to be appreciated. Even in the most experienced hands, this unwieldy tool remains, in the words of one leading scholar, "a highly unpredictable ally in the movement to reduce tobacco use."[91]

---

[90] *See generally* Richard A. Daynard and Graham E. Kelder, Jr., "The Many Virtues of Tobacco Litigation," 34 *Trial* 34 (November 1998).

[91] Robert L. Rabin, "The Third Wave of Tobacco Tort Litigation," in Robert L. Rabin and Stephen D. Sugarman, Eds., *Regulating Tobacco* (New York, Oxford University Press 2001), at 204. *See also* Robert L. Rabin," The Uncertain Future of Tobacco Tort Litigation in the United States," 7 *Tort Law Review* 91– 95 (1999).

Moreover, U.S.-style litigation cannot be imported, ready-made, into other legal systems and cultures. To attempt to do so would be not only naïve and simplistic, but dangerous. Poorly prepared, one-size-fits-all approaches run the risk of setting back tobacco control worldwide. Instead, litigation must be tailored and adapted to the unique legal, political, cultural and economic context of each country. As officials of WHO have observed, the use of law to promote public health:

> **is not . . . without limitations. The political, economic and social context of countries must be taken into account. ... [S]ufficient attention must be given to the significant regional and cultural variations which different nations give to law as an element of health policy. The concept of 'the rule of law' varies according to philosophical and cultural traditions.**[92]

What is needed is a strategic vision. Harnessing litigation's power in a world of many legal systems will require maturity, discipline and careful thought. Litigation is not for the faint of heart, but neither is it for the reckless. Tobacco litigation is not won by brawlers, but by martial arts experts.

This is not to discourage action. Member States are eager for movement, and movement is needed, but it must be forward. Forward movement requires clear-headed understanding of the risks; the capacity to recognize opportunities; and the skill, courage and resources to seize them — all backed by a rock-solid commitment to the undertaking.

This requires capacity — capacity that does not exist today. How can it be developed? The lesson of successful litigation, confirmed by the Consultation in Amman, is that certain elements are essential, and that support and assistance in developing them, under the guidance of a coordinating mechanism of some kind, is key to global progress.

Tobacco litigation is a multi-disciplinary enterprise, requiring a unique constellation of skills and experience that does not exist in most countries. To evaluate their options, most countries will need to draw on the insights of a collection of experts who, together, have specialized knowledge of successful tobacco litigation, the local legal and political system, international law, use of the tobacco documents, and the activities of the tobacco companies, as well as the medical and economic evidence necessary to prove a case. No such diverse assemblage of expertise exists today, and Member States

---

[92]L'hirondel, A. and Yach, D., "Develop and Strengthen Public Health Law," *World Health Statistics Quarterly*, Vol. 51, No. 1 (1998) at 79-87.

will need the assistance of WHO or another appropriate clearinghouse in developing such a resource.

Second, developing the options must be a collaborative process. There is an immediate need for a central forum for connecting those who are considering these issues, to encourage the sharing of insights and the formation of alliances.

Third, there is a need for technical assistance in using the tools that can serve as the building blocks for successful litigation: the tobacco industry documents and public inquiries. Here, the needs range from simple assistance in retrieving specific documents, to assistance in preparing exhaustive studies of documents of regional significance or in conducting high-visibility parliamentary inquiries. Use of the documents, public inquiries and litigation are each important in their own right, but they do not stand in isolation; they go hand in hand. Used correctly, each of these tools can support and advance the others. Here, too, Member States need assistance and support in using these mechanisms to maximum effect.

Finally, and most ambitiously, there was widespread sentiment among the participants in Amman that the global nature of the tobacco industry's activities[93] demands a global response. Just as the proposed Framework Convention on Tobacco Control will foster a unified global approach to tobacco control generally, participants in Amman felt that industry wrongdoing invites development of new forms of multi-party, cross-border international dispute resolution — what one participant called "a new architecture of global litigation."[94] In theory, litigation framed at a global level would capture the full picture of tobacco industry behavior, in contrast to the necessarily fragmentary impression likely in litigation that is limited only to those industry actions within a single state's borders. Even more importantly, an international approach would allow a pooling of resources and would help ensure that litigation outcomes accord equitable treatment to all countries, rich and poor.

Clearly, development of such a mechanism presents many difficult challenges. It was suggested that past international litigation, including cases involving asbestos claims, lead and mercury, pharmaceutical sales or Holocaust reparations, may hold lessons for possible new approaches. Other participants suggested the creation of new

---

[93] *See* Neil Francey and Simon Chapman, "'Operation Berkshire': The International Tobacco Companies' Conspiracy," 321*British Medical Journal* 371 (2000), and Neil Francey, "Tobacco Litigation: The Australian Experience in a Global Context," paper presented at the Amman Consultation, at 33-62.

[94]Tania Amir, "Opportunities and Obstacles for Litigation in Bangladesh," presentation at the Amman Consultation.

international institutions, ranging from a new court to expansion of the jurisdiction of the International Court of Justice or the proposed International Criminal Court. Development of these or other international models would require thoughtful consideration and consultations among Member States and a wide circle of experts and organizations, but was seen as a highly important goal.

VIII. STEPS FORWARD

Despite the complexity of the issues and the presence of risks and challenges, the elements necessary for progress are clear. There was broad consensus among participants at the Amman Consultation that the process begun there must be continued, and more importantly, institutionalized. There is no shortage of will to proceed. Rather, the barrier to action is the absence of the expertise and resources necessary to begin. The international dialogue must be expanded and deepened, and sources of assistance and support developed, if the enthusiasm for action among many Member States is to be unleashed.

This process requires the establishment of a central international mechanism, the participants in the Amman Consultation agreed. Such a mechanism, preferably within WHO, would serve as a focal point for the globalization of tobacco litigation and public inquiries. By helping Member States overcome the technical barriers, such a focal point could effectively leverage resources and action in many nations.

The immediate need, therefore, is to identify resources for creation of such a unit or organization, which would in turn develop resources and assistance for Member States. This unit would facilitate continued consultation and attention on these issues, and would assist in making connections and encouraging alliances among Member States, NGOs, academic experts and other centers of expertise. Such an organization would support Member States by providing or coordinating technical assistance in specific areas essential to effective use of tobacco industry documents, public inquiries and litigation.

Using the Documents

A central clearinghouse could assist Member States by:

- Promoting improved public access to the documents already available.
- Encouraging and supporting efforts to win release of additional documents.
- Acquiring, translating and interpreting relevant documents.
- Conducting research projects, preparing reports, and disseminating their findings.

- Collecting and disseminating secondary sources concerning the industry documents, including reports of inquiries, scientific articles and other document analyses.

- Directly undertaking targeted document research and preparing reports focused on particular states or regions, and on particular issues, especially issues of broad global interest (for example, smuggling activities or the activities of international tobacco industry bodies).

- Providing training and other support to build global capacity for document research.

Public Inquiries

Assistance is needed in:

- Collecting and disseminating the reports or results of public inquiries, whether conducted by WHO itself, by Member States or by independent bodies or authors.

- Designing, organizing and conducting public inquiries.

- Coordinating international consultation, to encourage the most targeted and strategic use of national inquiries, to advance tobacco control at the global level.

- Coordinating effective use of inquiries to gain access to industry documents and to build the evidentiary basis necessary to expand litigation options.

Litigation

Litigation involves the most complex technical barriers to action. Here, assistance is needed in:

- Monitoring, and reporting on, significant developments in ongoing global litigation.

- Developing a nucleus or network of legal experts with specialized knowledge and experience in tobacco litigation, diverse legal systems and international law.

- Facilitating interaction among experts from these and other fields, to integrate their expertise and apply it to specific Member States' situations.

- Identifying and disseminating the lessons of successful litigation, with special emphasis on successes in developing countries, such as the recent Indian writ litigation.

- Promoting international exchanges among experts and officials.

- Commissioning legal research on issues of broad international interest (for example, issues specific to courts grounded in Islamic tradition, global opportunities for public interest writ litigation, or issues involved in asserting claims under international legal commitments).

- Helping individual Member States to elaborate and assess their legal options.

- Helping Member States identify and mobilize litigation resources.

- Encouraging strategic decisions that pursue promising litigation while avoiding cases likely to fail or to set back global progress.

- Providing direct support and consultation to those states that undertake litigation.

- Exploring models for internationalizing tobacco litigation, whether through cross-border litigation in existing courts, or through the creation of new forms of litigation or new international institutions. This process would include studying the lessons of successful international litigation in other contexts, identifying opportunities for expanding global legal institutions, and sponsoring international consultation to advance opportunities for a consolidated global approach.

Support and assistance in these areas would provide a powerful catalyst to global progress, participants agreed. Indeed, the absence of such support today creates the risk that, for lack of the necessary information and expertise, some states (perhaps encouraged by private attorneys promising windfall recoveries) may pursue ill-conceived or ill-prepared litigation that will not only jeopardize their own legal rights, but may also undermine the legal position of other states. This makes the need for assistance urgent.

IX. CONCLUSION

The world is accustomed to thinking of the law as an instrument of justice, but not as an instrument of health. We expect epidemics to be defeated in the clinic or the community, not in the courtroom. Yet the power of the law to help fight the global tobacco epidemic is now undeniable. Used with discipline, the law can awaken public outrage, strengthen public policies and redress injuries — results that advance both justice and health.

This powerful new tool is not for everyone. Like fire, or a dangerous weapon, it must be handled with care. But the law has now become an indispensable component of a comprehensive global tobacco control agenda, and nations in every part of the world are eager to tap its power. It is time for the global health community to find common purpose in seeing that this is done wisely and for the benefit of all countries. It is time that the tools of law be harnessed in the service of global health and global justice.

ACKNOWLEDGEMENTS

This report was supported by the "WHO Consultation on litigation and public inquiries as public health tools" which took place in Jordan , 5-7 February 2001, and all participants of the meeting are thanked for their input. (See Annex 1 for full list of participants.)

We also wish to thank the United Nations Foundation (UNF) for their on-going support to tobacco control. The contribution of Dr Hussein A.Gezairy, Dr. Derek Yach, Ms Chitra Subramaniam and Dr. Fatima M.S. El Alwa in putting this report together deserves special mention. The NMH Policy Analysis and Communications team is also gratefully acknowledged.

ANNEX 1

List of Participants

WHO CONSTULATATION ON LITIGATION AND PUBLIC INQUIRIES AS PUBLIC HEALTH TOOLS FOR TOBACCO CONTROL

Amman, Kingdom of Jordan, 5-7 February 2001

- Ahmed M. A. Kareem Al- Mulla
- Anwar Gasem Bou-Rahma
- Abdullah El- Badah
- Jawad El-Lawati
- Hamdi El- Sayed
- Ahmed Osman El-Tawjry
- Kamal Imam
- Tawfik Khoja
- Salah Montaser
- Walid Nizal
- Sherif Omar
- Tania Amir
- Linda Bailey
- Clive Bates
- Douglas Blanke
- Richard Daynard
- John A. Eaves
- Neil Francey
- Andrea Gay
- Mark Gottlieb
- Linda Hoffman
- Rani Jethmalani
- M. Kiima
- Yasantha Kodagoda
- Justice K. N. Kurup
- Patricia Lambert
- Charles Maringo
- Anke Martiny
- H.E. Rajak
- Byron Rogers
- Pam Nadarasa
- Yussuf Saloojee
- Donald J. Sharp
- David Sweanor
- Daniel A. Webster
- William Wheeler
- Celia White

WHO SECRETARIAT

- Hussein A. Gezairy
- Abdullah Saleh Assa`edi
- Derek Yach
- Fatimah El Awa
- Chitra Subramaniam
- Patsy Harrington
- Mona Nassef
- Ingi El Manasterly

Tobacco kills more than 4 million people every year. By 2020, it is estimated to kill 8.4 million people, seventy percent of whom will be from developing countries.

Tobacco kills, don't be duped.

Tobacco Free Initiative
World Health Organization
Avenue Appia 20
CH-1211 Geneva 27
Tel:+41 22 791 21 08
Fax:+41 22 791 48 32
E-mail: tfi@who.int
Web site: http://tobacco.who.int